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Supreme Court, U.S.
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E. ROBERT SEAVER, CL

APPENDIX

In the Supreme Court
OF THE
United States

OCTOBER TERM, ~~1970~~ 1971

No. ~~939~~ 70-34

SIERRA CLUB, a California corporation, *Petitioner*

vs.

ROGERS C. B. MORTON, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,
Respondents

On Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed November 5, 1970
Certiorari Granted February 22, 1971

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

June 5, 1969	Plaintiff filed complaint and notice of motion for preliminary injunction with supporting documents
July 23, 1969	Memorandum of decision re grant of preliminary injunction filed
Aug. 4, 1969	Preliminary injunction filed
Aug. 12, 1969	Answer filed
Sept. 19, 1969	Notice of appeal filed
Sept. 16, 1970	Opinion and judgment of the Court of Appeals for the Ninth Circuit entered

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ORIGINAL
FILED
JUN - 5 1969
CLERK, U. S. DIST. COURT
SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, a non-profit California corporation,
Plaintiff,

vs.

WALTER J. HICKEL, individually and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually and as Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service; and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,
Defendants.

COMPLAINT

Civil Action

No. 51464

JURISDICTION

1. This action is brought under 5 U.S. §§ 701-706 (Administrative Procedure Act § 10), 28 USC § 1331(a), 28 USC § 1361, and 28 USC § 2201, (Declaratory Judgments Act).

2. The matter in controversy exceeds $10,000 exclusive of interest and costs and arises under the federal law as hereinafter more fully appears.

FIRST CLAIM FOR RELIEF

3. Plaintiff SIERRA CLUB is a non-profit corporation organized and operating under the laws of the State of California, with its principal place of business in San Francisco, California since 1892. Membership of the club is approximately 78,000 nationally, with approximately 27,000 members residing in the San Francisco Bay Area. For many years the SIERRA CLUB by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested. One of the principal purposes of the SIERRA CLUB is to protect and conserve the national resources of the Sierra Nevada Mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants as hereinafter more fully appears.

4. (a) Defendant WALTER J. HICKEL (hereinafter "HICKEL") is Secretary of the Interior of the United States, and the matters hereinafter referred to as pertaining to "Interior" or the "National Park Service" are within the "Department of Interior" of which he is the chief officer. His predecessor in office was Stewart L. Udall (hereinafter "Udall").

(b) Defendant JOHN S. McLAUGHLIN (hereinafter "McLAUGHLIN") is Superintendent of Sequoia National Park.

(c) Defendant CLIFFORD M. HARDIN)hereinafter "HARDIN") is Secretary of Agriculture of the United States, and the matters hereinafter referred to as pertaining to "Agriculture" or the "National Forest Service" are within the "Department of Agriculture" of which he is the chief officer. His predecessor in office was Orville W. Freeman (hereinafter "Freeman").

(d) Defendant J. W. DEINEMA (hereinafter "DEINEMA") is Regional Forester of the Forest Service for the region which includes the Sequoia National Game Refuge.

(e) Defendant M. R. JAMES (hereinafter "JAMES") is the Forest Supervisor in the National Forest Service in charge of the Sequoia National Forest.

5. In or about February 1965, the National Forest Service (hereinafter "Forest Service") solicited bids for the construction and operation of a year-round commercial-recreational resort in and near the Mineral King Valley (hereinafter "Mineral King") which is located in the Sequoia National Game Refuge of California. The game refuge is more fully described in the Act of July 3, 1926 (P.L. 69-465, 26 Stat. Ch. 744, Sec. 6).

6. In or about January 1966, the Forest Service granted to Walt Disney Productions, Inc. (hereinafter "Developer") a preliminary permit authorizing it to make surveys and prepare plans for development of Mineral King.

7. On or about 21 January, 1969, the Forest Service approved the proposed plan of Developer for the commercial-recreational development of Mineral King. Plaintiff is informed and believes and based upon such information and belief alleges that under the approved plan the development will have at least the following features:

(a) An "alpine village" and associated structures permanent in nature including parking structure, restaurants, lodging facilities, sewage treatment facilities, swimming and ice skating facilities which will physically occupy and affect areas far in excess of 80 acres of land;

(b) Ski-lifts, cleared slopes, lift lines, trails, roads, a cog-assisted railroad, water and stream control features, avalanche dams and other recreational "improvements" throughout 13,000 acreas directly affecting by actual construction and development an area occupying nearly 400 acres of land;

(c) The year-long use of the resort will include the presence in said area of an estimated 1,200 vehicles per hour each way on an access road which is proposed to cross Sequoia National Park to the development, 3,600 parked vehicles, the lodging of 3,310 transient guests per night, up to 8,500 skiers

per day, the permanent housing of 700 or more employees and 986,000 or more total visitors per year as early as 1978; and

(d) The exact nature of other details is not yet known to plaintiff, which prays leave to insert them when discovered.

8. The Forest Service has announced and plaintiff alleges on information and belief that defendants HARDIN, DEINEMA and JAMES intend to issue interim special use permits for the actual commencement of construction and operation of the described development in or about the summer of 1969. In the meantime, the Forest Service has issued a permit under which employees of Developer continue to make studies and arrangements for the construction and operation of the commercial-recreational development. Also in the meantime, the Forest Service continues to assign personnel and expend public monies in making studies and other preparations for the eventual operation and administration of the Mineral King development.

9. The approval of the described plans and the impending issuance of permits to Developer for construction and operation in accordance with those plans and the acts of defendants HARDIN, DEINEMA and JAMES in association therewith are in excess of statutory jurisdiction, authority and limitations, are not in accordance with law, are arbitrary, capricious and constitute an abuse of discretion in that (among other things) the described acts are:

(a) in violation of the provisions of the Act of March 4, 1915, as amended July 28, 1956 (38 Stat. 1101, 70 Stat. 708; 16 USC § 497) which limits the size, terms and manner of occupation of lands for resorts and associated facilities in the national forests and which is far exceeded by the subject development;

(b) in violation of the provisions of the Act of June 4, 1897, as amended (30 Stat. 35, 33 Stat. 628, 76 Stat. 1157 and 78 Stat. 745; 16 USC § 551) regarding the permit power of the Secretary of Agriculture, which has been and will be exceeded;

(c) beyond the jurisdiction of the said defendants in that responsibility for conservation of game, birds and wildlife in Sequoia National Game Refuge and other such sanctuaries was transferred to the Secretary of the Interior by the Reorganization Act of 1939 (53 Stat. 1431, Ch. 195, Sec. 4; 53 Stat. 813);

(d) in violation of the provisions of the Act of July 3, 1926 (P.L. 69-465, 1926 Stats. Ch. 744, Sec. 6) establishing the Sequoia National Game Refuge whose purposes are contravened by the subject development;

(e) in violation of Forest Service rules and regulations, and in violation of applicable principles of administrative law, in that it has declined and refused to hold public hearings on the question of whether Mineral King should be developed, or how it should be developed for commercial-recreational purposes or for any other purpose; and

(f) in violation of Forest Service rules and regulations, and in violation of fundamental principles of administrative law in that it has acted without due consideration of the factors which it is required to consider in reaching a decision on whether Mineral King should be developed, or how it should be developed, for recreational purposes.

10. There exists a present controversy between plaintiff and defendants with respect to the matters hereinbefore set forth.

11. Defendants have acted, are acting and threaten to continue to act in violation of the law, as hereinbefore set forth. Unless restrained, they will cause, or permit to be caused, damage to Mineral King which will be irreparable, in part, for many human generations, and irreparable, in part, for all eternity.

12. There are no administrative remedies available to plaintiff, and plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays as hereinafter set forth.

SECOND CLAIM FOR RELIEF

13. Paragraphs 1-9 of the First Claim for Relief are incorporated herein by reference.

14. In order to provide access to the proposed commercial-recreational development at Mineral King, the Forest Service sought permission from the National Park Service and the Secretary of Interior for the construction of a highway, 9.2 miles of which would cross Sequoia National Park.

15. In or about December 1967, Secretary Udall granted formal approval of the routing of that highway (which would be constructed and maintained by the State of California). Approval for a right-of-way, construction and operation was expressly left open pending further study concerning the design standards of the highway. Plaintiff alleges on information and belief, however, that agreement on design standards is near and upon such agreement, defendants HICKEL and McLAUGHLIN will issue their approval for a right-of-way, construction and operation of the highway across Sequoia National Park and that the State of California will let contracts for the commencement of construction upon issuance of that approval.

16. Plaintiff is informed and believes and based upon such information and belief alleges that the purpose of the proposed highway would be simply to provide a means to cross the Sequoia National Park and serve the Mineral King development rather than to serve any fundamental purpose of the Park. Plaintiff further alleges on information and belief that the construction of said road in Sequoia National Park would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations.

17. The approval of the routing of said access road and the impending issuance of authorization for rights-of-way, construction, and operation of said road and the acts of defendants HICKEL and McLAUGHLIN in connection therewith are in excess of their statutory jurisdiction, authority and limitations,

are not in accordance with law, are arbitrary, capricious and constitute an abuse of discretion in that (among other things) the described acts are:

(a) in violation of the provisions of the Act of August 25, 1916, as amended (39 Stat. 535, as amended; 16 USC § 1) which prohibits uses of the national parks which do not conform to the fundamental purposes of said parks;

(b) in violation of the provisions of the Act of September 25, 1890 (26 Stat. 478, 16 USC § 41 and § 43), establishing Sequoia National Park as a public park and imposing the duty upon the Secretary for the "preservation from injury of all timber, natural curiosities or wonders within said park, and their retention in their natural conditions";

(c) in violation of regulations requiring a public hearing with respect both to the general corridor to be occupied by the proposed road and to its design, as set forth in 34 Fed. Reg. 1405 (January 29, 1969). Purported repeal of those regulations was not in accordance with 5 U S C § 553(b) and therefore is without legal effect. Nevertheless, unless restrained, defendants HICKEL and McLAUGHLIN threaten to proceed to permit the proposed road to be constructed across Sequoia National Park without first holding the public hearing required by the aforesaid regulations; and

(d) in violation of Park Service rules and regulations, and fundamental principles of administrative law, in that defendants HICKEL and McLAUGHLIN have acted without due consideration of the factors which they are required by law to consider in reaching a decision upon whether an enlarged road across Sequoia National Park should be permitted for purposes not benefiting that Park and, if so, what type of road should be permitted.

18. There exists a present controversy between plaintiff and defendants with respect to the matters hereinbefore set forth.

19. Defendants HICKEL and McLAUGHLIN have acted, are acting, and threaten to continue to act in violation of the law, as hereinabove set forth. Unless restrained, they will cause, or permit to be caused, damage to Sequoia National Park which will be irreparable, in part, for many human generations, and irreparable, in part, for all eternity.

20. There are no administrative remedies available to plaintiff, and plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays as hereinafter set forth.

PRAYER

WHEREFORE, plaintiff prays judgment as follows:

1. Against defendants HARDIN, DEINEMA and JAMES, and each of them, for a judgment declaring that the approval given on or about 21 January, 1969, of the Walt Disney Productions, Inc. Mineral King Development Plan by defendants HARDIN, DEINEMA and JAMES, and each of them, and the threatened issuance of permits for construction and operation in furtherance thereof is in violation of law and therefore null and void, to wit, in violation of each and all of the following: 16 USC § 497; 16 USC § 551; P.L. 193, § 4 (the Reorganization Act of 1939); the Act of July 3, 1926, establishing the Sequoia National Game Refuge; and fundamental principles and requirements of administrative law.

2. For both a preliminary and permanent injunction enjoining defendants HARDIN, DEINEMA and JAMES, and each of them, and their successors in office and the respective employees, servants, attorneys and agents thereof, and all other persons, in active concert or participation with them, from granting any permits, rights of way, approvals, or taking any action whatsoever toward the implementation of said Development Plan above referred to or any other development of like or similar nature thereto.

3. Against defendants HICKEL and McLAUGHLIN, and

each of them, for a judgment declaring that the aforementioned approval of the routing of a highway across and through the Sequoia National Park by defendants HICKEL and McLAUGHLIN, and each of them, and/or their predecessors in office, and the threatened issuance of approvals for rights of way, construction and operation of a highway across and through said Sequoia National Park is in violation of law and therefore null and void, to wit, in violation of each and all of the following: 16 USC § 1; 16 USC §§ 41, 43, 34 Fed. Reg. 1405 (January 29, 1969); Park Service rules and regulations; and fundamental principles and requirements of administrative law.

4. For both a preliminary and permanent injunction enjoining defendants HICKEL and McLAUGHLIN, and each of them, their successors in office and the respective employees, servants, attorneys and agents thereof and all other persons, in active concert or participation with them, from taking any action whatsoever toward authorizing or approving (i) design standards or rights of way of said highway or any other of similar or like purpose; (ii) construction or maintenance of said highway or any other of similar or like purpose by the State of California or any other entity or person.

5. Grant to plaintiff such other further relief as to this Court may appear just and proper, including costs and disbursements.

Dated at San Francisco, June 5, 1969.

FELDMAN, WALDMAN & KLINE
LEO E. BORREGARD
LELAND R. SELNA, JR.
MATTHEW P. MITCHELL

By Leland R. Selna, Jr.
Attorneys for Plaintiff
Sierra Club

ROBERT W. JASPERSON
GREGORY ARCHBALD

Of Counsel

STATE OF CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO } ss. No. 51464

J. MICHAEL McCLOSKEY, being first duly sworn, deposes and says:

That he resides at Alameda County, California; that he is the Conservation Director and Chief of Staff of The Sierra Club, a non-profit California corporation, plaintiff herein; that he has read the foregoing complaint, and that he is informed and believes the matters therein to be true and on that ground alleges that the matters stated therein are true.

J. Michael McCloskey
J. Michael McCloskey

Subscribed and sworn to before me this 4th day of June, 1969.

LINDA A. UMBERTUS
Notary Public

My Commission expires:

LINDA A. UMBERTUS
NOTARY PUBLIC - CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
My Commission Expires January 20, 1973

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SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, a non-profit California corporation,
Plaintiff,

vs.

WALTER J. HICKEL, individually and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually and as Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service; and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,
Defendants.

NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION

Civil Action

No. 51464

TO DEFENDANTS ABOVE NAMED

PLEASE TAKE NOTICE that on June 30, 1969, at 10:00 A.M. or as soon thereafter as counsel can be heard before the Law and Motion Department of the above-entitled Court, 450 Golden Gate Avenue, San Francisco, California, plaintiff SIERRA CLUB, a non-profit corporation, will move the Court for a preliminary injunction enjoining the above-named defendants, and each of them, and their respective agents, servants, employees and attorneys and all persons in active consert and participation with them in accordance with and as prayed for in

the verified complaint herein and filed and served herewith pending the final hearing and determination of this action. Said motion will be made upon said complaint, the Affidavit of J. Michael McClosky and the Memorandum of Points and Authorities, all served and filed herewith, and upon the pleadings, records and files in the action and such evidence as may be adduced at the time of hearing.

Dated at San Francisco, June 5, 1969.

FELDMAN, WALDMAN & KLINE
LEO E. BORREGARD
LELAND R. SELNA, JR.
MATTHEW P. MITCHELL

By LELAND R. SELNA, JR.
Attorneys for Plaintiff
Sierra Club

ROBERT W. JASPERSON
GREGORY ARCHBALD

Of Counsel

United States Department of Agriculture Forest Service SAMPLE TERM SPECIAL USE PERMIT (Act of March 4, 1915, as amended July 31, 1956)		NAME OF PERMITTEE	KIND OF USE
		DATE OF PERMIT	FILE CODE
REGION 5	STATE California	FOREST Sequoia	RANGER DISTRICT Tule River

Permission is hereby granted to (successful proponent)

of

hereinafter called the permittee, to use subject to the conditions set out below, the following described lands or improvements for the period of 30 years from the date hereof:

National Forest land in portions of sections 15, 22, 27, 28 and 34, Mount Diablo Meridian, Sequoia National Forest, constituting the sites physically occupied by capital improvements other than roads, parking areas, and refuse and sewage disposal areas, as shown on the map attached to and made part hereof. Sites in other sections may be added by future amendment [if public interest warrants]

This permit covers not to / exceed 80 acres and/or _____ miles and is issued for the purpose of:

Constructing, operating, and maintaining a winter and summer recreation development consisting of improvements and services specifically authorized by this permit in Clause 22.

The exercise of any of the privileges granted in this permit constitutes acceptance of all the conditions of this permit.

[illegible] See Clause 19

[illegible]

Provided, however, That the charges for this use shall be readjusted as of, and effective on, the beginning of each 5-year period from the due date of the first annual payment in order to place the charges on a basis commensurate with See Clause 19.

2. Construction or occupancy and use under this permit shall begin within 3 months [illegible] from the date of the permit. This use shall be actually exercised at least 150 days each year, unless otherwise authorized in writing.

3. Development plans; lay-out plans; construction, reconstruction, or alteration of improvements; or revision of lay-out or construction plans for this area must be approved in advance and in writing by the forest supervisor. Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved and has marked or otherwise designated that which may be removed or destroyed. Timber cut or destroyed will be paid for by the permittee as follows: Merchantable timber at appraised value; young-growth timber below merchantable size at current damage appraisal value; provided that the Forest Service reserves the right to dispose of the merchantable timber to others than the permittee at no stumpage cost to the permittee. Trees, shrubs, and other plants may be planted in such manner and in such places about the premises as may be approved by the forest officer in charge.

2720-6 (Rev. 1/61)

EXHIBIT 2

sanitation, and safety acceptable to the forest officer in charge.

5. This permit is subject to all valid claims.

6. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

7. The permittee shall take all reasonable precaution to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the forest officer in charge or his authorized agent.

8. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the national forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.

9. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

10. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

11. Except as provided in Clause 16 below, upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and the restoration of the site.

12. This permit is not transferable. If the permittee through voluntary sale or transfer, or through enforcement of contract, foreclosure, tax sale, or other valid legal proceeding shall cease to be the owner of the physical improvements other than those owned by the United States situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise reestablish title to said improvements, this permit shall be subject to cancellation. But if the person to whom title to said improvements shall have been transferred in either manner above provided is qualified as a permittee, and is willing that his future occupancy of the premises shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, his continued occupancy of the premises will be authorized by a permit to him, which may be for the unexpired term of this permit or for such new period as the circumstances justify.

13. In case of change of address, permittee shall immediately notify the forest supervisor.

14. The temporary use and occupancy of the premises and improvements herein described may not be sublet by the permittee to third parties without the prior written approval of the forest supervisor and the permittee shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

15. This permit may be terminated upon breach of any of the conditions herein.

16. If during the term of this permit or any extension thereof, the Secretary of Agriculture or any official of the Forest Service acting by or under his authority shall determine that the public interest requires termination of this permit, this permit shall terminate upon thirty days' written notice to the permittee of such determination, and the United States shall have the right thereupon to purchase the permittee's improvements, to remove them, or to require the permittee to remove them, at the option of the United States, and the United States shall be obligated to pay an equitable consideration for the improvements or for removal of the improvements and damages to the improvements resulting from their removal. The amount of the consideration shall be fixed by mutual agreement between the United States and the permittee and shall be accepted by the permittee in full satisfaction of all claims against the United States under this clause: *Provided*, That if mutual agreement is not reached, the Forest Service shall determine the amount and if the permittee is dissatisfied with the amount thus determined to be due him he may appeal the determination in accordance with Regulation A-10 (36 CFR 211.2) and the amount as determined on appeal shall be final and conclusive on the parties hereto; *Provided further*, That upon the payment to the permittee of 75% of the amount fixed by the Forest Service, the right of the United States to remove or require the removal of the improvements shall not be stayed pending final decision on appeal.

17. ~~The permittee agrees that the amount which the United States shall be required to pay for improvements in accordance with Clause 16 shall in no event exceed $ _____, and that this instrument may be introduced in any judicial proceedings for the acquisition of such improvements by the United States as the stipulation of the permittee and the United States with regard to the maximum amount which the United States shall be required to pay for the improvements.~~

17 ~~18~~ In the event of any conflict between any of the preceding printed clauses or any provision thereof and any of the following clauses or any provisions thereof, the preceding printed clauses will control.

18 ~~16~~ This permit is accepted subject to the conditions set forth above and to conditions 19 to 41 attached hereto and made a part of this permit.

DATE	SIGNATURE OF ISSUING OFFICER	TITLE
DATE	SIGNATURE OF PERMITTEE	

GPO 903140

19. This use is classified as Class III and the fees due the United States shall be calculated according to the following schedule:

_____percent of net sales and other income.

A minimum fee of $_____per annum is hereby established for this permit which shall be a minimum occupancy fee, due in advance, and not subject to refund.

The permittee will send to the Forest Supervisor, Sequoia National Forest, Porterville, California, on or before (2 months after close of permittee's fiscal year) of each year a statement of net sales and of other income resulting from the operations under this permit, or a profit and loss statement or other evidence, satisfactory to the Forest Supervisor, of the business transacted by the permittee.

The Forest Supervisor may require that any such statement be sworn to, and shall have the further right to examine the permittee's accounting records and supporting data.

The Forest Service shall have the right to require the permittee to maintain an acceptable accounting system, and shall have the right to require the permittee, at his expense, to have his books audited by an accountant acceptable to the Forest Service and furnish to the Forest Service a copy of the audit report.

Upon receipt of a satisfactory statement from the permittee, the Forest Supervisor will calculate the fees due according to the above percentage and will bill the permittee for this amount, less the amount of the minimum fee paid in advance, provided the latter is less than the calculated fee. If the minimum fee paid in advance is greater than the calculated fee, no refund will be made.

In consideration for this use, the permittee shall deposit with the Regional Fiscal Agent, U. S. Forest Service, 630 Sansome Street, San Francisco, California, a check, draft, or money order made payable to the Forest Service, USDA, as follows:

1. On or before (Date of beginning of permittee's fiscal year) of each year $_____ which is the established minimum fee for this use.

2. Within 30 days of receipt of statement from the Forest Supervisor, the amount calculated in accordance with the above percentage of the net sales and other income reported by the permittee and accepted by the Forest Supervisor.

Definition of Net Sales. The term "net sales", for the purpose of calculating special-use fees, shall be the gross amounts derived from all sources of the business conducted on the permitted area, or connected therewith, minus the following items:

a. Returned merchandise, refunds, and allowances.

b. State sales tax.

c. Federal excise taxes required to be collected by the permittee from the customer and paid by him to the Government (for example, taxes on theater tickets, and other admissions).

d. Federal retailer's excise taxes required to be paid by permittee to the Government (for example, taxes on sale of furs, jewelry, toilet preparations, luggage, etc.).

e. State gasoline tax, regardless of whether or not paid by permittee to the State taxing authority.

f. Amounts remitted to States representing proceeds from the sale of hunting and fishing licenses. Any commissions or fees received by permittees for selling such licenses are includable in "net sales".

30. Bonds. To guarantee the fulfillment of the conditions contained in Clause 22 of this permit, the permittee will furnish the Forest Service a surety bond in the sum of Twenty Five Thousand Dollars ($25,000) or in lieu of surety bond, shall deposit into a Federal Depository, through the Regional Fiscal Agent specified in Clause 19 of this permit, cash in the sum of Twenty Five Thousand Dollars ($25,000). As soon as security for the performance of the terms of Clause 22 or the settlement of claims incident thereto is no longer necessary, deposits in lieu of surety bond will, subject to the conditions set forth in the sentence immediately following, be returned to the permittee without interest. The permittee agrees that all moneys deposited under this permit may, upon failure on his part to fulfill all and singular the requirements herein set forth or made a part hereof, be retained by the United States to be applied as far as may be to the satisfaction of his obligations assumed hereunder, without prejudice whatever to any other rights and remedies of the United States.

31. Insurance. The permittee shall indemnify the United States against any liability for damage to life or property arising from the permittee's occupancy or use of National Forest lands, facilities, or equipment under this permit, or by the permittee's customers or guests while using the permitted area; provided this shall not be construed to indemnify the United States against its own negligence.

At all times when any of the operations authorized by this permit are open to the public, the permittee shall have in force public liability insurance covering damage to persons in the minimum amount of $100,000 in the event of death or injury to one individual and the minimum amount of $500,000 in the event of death or injury to more than one individual for which the permittee may be liable in connection with the occupancy or use of the land and the construction, maintenance, and operation of the structures, facilities, or equipment authorized by this permit. The permittee shall require the

insurance company to send an authenticated copy of his insurance policy to the Forest Service immediately upon its issuance. This policy shall contain a specific provision or rider to the effect that the policy will not be canceled or its provisions changed or deleted before 30 days written notice to the Forest Supervisor, Sequoia National Forest, Porterville, California, by the insurance company.

CONSTRUCTION AND OPERATING REQUIREMENTS

(See printed Clauses 2 and 3)

22. (This Clause will consist of a schedule for completion of each major development as determined following review and approval of the successful proponent's developmental and architectural plans. Such plans will be attached to and become a part of the permit, either physically or by appropriate reference).

No modification of the approved plans will be permitted unless specifically authorized by the Forest Supervisor in writing.

23. The design, construction, maintenance and operation of tramways and lifts shall conform to the American Standard Safety Code for Aerial Passenger Tramways. Specific exceptions may be made by the Forest Supervisor in writing. The design, construction, and maintenance of operation of lifts shall also conform to the Aerial Passenger Tramway Safety Orders of the California Division of Industrial Safety. In addition: (1) Tower and terminal sites shall be inspected in advance of construction by a Forest Officer. Protective measures as he prescribes shall be provided. (2) Safety stops on rope tows shall be of the flying ring type.

24. It is required that a California registered architect or registered engineer prepare site and building plans. Drawings must be signed by the registered architect or engineer with their registration number. State Division of Housing approval also must be obtained.

25. The permittee will assure slope stabilization and prevent soil loss throughout the permitted area by carrying out the provisions of a winter sports area erosion control plan. Said plan, when approved, shall be attached to and made a part of this permit.

26. Brush and debris resulting from all clearing shall be disposed of in a manner and at a time satisfactory to the forest officer in charge.

27. The permittee, shall, before the start of public service operations, and prior to the start of operations each year thereafter, join with the Forest Service in preparing a snow safety plan, which shall be attached to and become a part thereof upon approval of the Forest Supervisor, such plans to include the following as a minimum: (1) Special safety devices and testing. (2) Operator requirements at each lift or tow. (3) Required first aid equipment; transport or location of caches. (4) Ski slope signing

and flagging. (5) Availability of qualified Red Cross first aiders and accident reporting. (6) Avalanche, snow slide, or other natural hazards needing control. (7) Restriction of ski slopes to skiing, i.e., control of waiting lines, snags, toboggans. (8) Ski patrol requirements. (9) Operator instructions on use of lift, tow, to novices. (10) Tow track and slope maintenance. (11) Parking area traffic control and attendant requirements.

28. The execution of all parts of the snow safety plan is the responsibility of the permittee.

29. A fire prevention and control plan adequate in the judgment of the Forest Supervisor to the risks and hazards of this use shall be prepared and placed in effect by the permittee. The Fire Plan, when approved, shall be attached to and become a part of this permit.

30. All signing pertaining to the resort and its operation shall be submitted for approval of the Forest Supervisor prior to erection. Operational signs will be required in order to:

(1) Identify the area as a special use development on the Sequoia National Forest.

(2) Furnish visitors with information as to length, elevation difference and classification of ski trails.

(3) Inform the public where medical supplies and first aid patrolman may be found.

(4) Warn visitors of avalanche hazards.

(5) Encourage compliance with established winter sports etiquette.

The permittee in his advertisements, signs, circulars, pamphlets, letterheads, or like material, shall refrain from misrepresenting in any way, either the accommodations provided or the status of this permit, or of the area covered thereby or adjacent thereto and shall identify the operation as being located within the Sequoia National Forest.

31. No lines of business other than those listed in this permit may be conducted without the written approval of the Forest Supervisor.

32. The permittee will, upon request of the Forest Supervisor, submit his schedule of charges for review and, if in the Forest Supervisor's judgment he determines the rates to be excessive or out of line with rates charged for similar services elsewhere, he may require the permittee to show cause why they should not be reduced.

33. The Director of the ski school must be fully certified as a ski instructor by a recognized certifying body of the U. S. Ski Association or one of its divisions. About one third of the remaining instructors must hold associate or better certificates, with the aim to get all instructors fully certified. The permittee will designate areas where ski instruction will be conducted to avoid conflict with general public use.

34. The permittee shall provide an organized, trained, and adequately equipped ski patrol to serve according to the snow safety plan of this permit. Ski patrolmen qualifications, training, and equipment, will equal or exceed the standards of the National Ski Patrol System. Patrolmen may be provided on a paid or voluntary basis, or both. Paid ski patrolmen on patrol duty will not perform routine operating duties.

GENERAL

35. This permit is for land occupancy only and does not provide for the furnishing of road maintenance, water, fire protection, snow removal or any other such services.

36. There is specifically reserved a right of free and unrestricted access, in, through, and across the land covered by this permit for officers and employees of the United States in the performance of their official duties and for users of National Forest land, and purchasers of National Forest products when not inconsistent with the exercise of the authorized use herein granted.

37. Lifts and tramways shall be open to the free use of Forest Service personnel responsible for the administration or inspection of this recreation area, as designated by the Forest Supervisor.

38. The permittee shall indemnify the United States against any liability for damage to life or property arising from the permittee's occupancy or use of national forest lands, facilities, or equipment under this permit or by the permittee's customers or guests while using the lift or tramway-serviced area; provided this shall not be construed to indemnify the United States against its own negligence.

39. The permittee, if a corporation, shall furnish evidence of authority for execution of this agreement on behalf of said corporation. Such corporation agrees to furnish the Forest Supervisor with a current list of officers of its governing body, and to maintain a representative of the corporation in residence on this site, fully authorized to conduct corporation business with the Forest Service.

40. In connection with the performance of work under this permit, the permittee agrees as follows:

(1) The permittee will not discriminate against any employee or applicant for employment because of race, creed, color or national origin. The permittee will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The permittee agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Forest Service setting forth the provisions of this non-discrimination clause.

(2) The permittee will, in all solicitations or advertisements for employees placed by or on behalf of the permittee, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(3) The permittee will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Forest Service advising the said labor union or workers' representative of the permittee's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The permittee will comply with all provisions of Executive Order No. 10925 of March 6, 1961, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(5) The permittee will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will permit access to his books, records, and accounts by the Forest Service and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the permittee's non-compliance with the non-discrimination clauses of this permit or with any of the said rules, regulations, or orders, this permit may be cancelled in whole or in part and the permittee may be declared ineligible for further government permits in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961, and such other sanctions may be imposed and remedies invoked as provided in the said Executive Order or by rule, regulation, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(7) The permittee will include the provisions of the foregoing paragraphs (1) through (6) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. The permittee will take such action with respect to any subcontract or purchase order as the Forest Service may direct as a means of enforcing such provisions, including sanctions for non-compliance: Provided, however, that in the event the permittee becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Forest Service, the permittee may request the United States to enter into such litigation to protect the interests of the United States.

41. This permit shall have no force or effect until it has been signed by the permittee and the Forest Service.

Date_____ Permittee_____

Date_____ CHAS. A. CONNAUGHTON
Regional Forester

By_____
Issuing Officer

Area Permit - (Supplemental to Term Permit)

SAMPLE

SPECIAL USE PERMIT

Act of June 4, 1897, as amended
This permit is revocable and nontransferable

REGION	STATE	FOREST	RANGER DISTRICT
5	California	Sequoia	Tule River

Permission is hereby granted to _____(Successful proponent)_____

of _____,

hereinafter called the permittee, to use subject to the conditions set out below, the following described lands or improvements:

National Forest land in portions of sections 15, 22, 27, 28, and 34, Mount Diablo Meridian, Sequoia National Forest, shown on the map attached to the Term Permit of _____(date)_____ issued to the above permittee, as needed for the users of the facilities and improvements specified in Clause 22 of the term permit.

This permit covers _____ acres and/or _____ miles and is issued for the purpose of:

Developing and maintaining ski slopes, trails, parking areas, refuse and sewage disposal areas, roads, etc. in conjunction with the facilities and improvements specified in Clause 22 of theforegoing Term Permit.

The exercise of any of the privileges granted hereby constitutes acceptance of all the conditions of this permit.

1. In consideration for this use, the permittee shall pay to the Forest Service, U.S. Department of Agriculture, the sum of _____ Dollars ($_____) for the period from _____, 19____, to _____, 19____, and thereafter annually on _____ (see Clause 12 of Term Special Use Permit) _____, _____ Dollars ($_____):

[redacted]

EXHIBIT 3

2. Construction or occupancy and use under this permit shall begin within _____ months, and construction, if any, shall be completed within _____ months, from the date of the permit. This use shall be actually exercised at least _____ days each year, unless otherwise authorized in writing.

3. Development plans; layout plans; construction, reconstruction, or alteration of improvements; or revision of layout or construction plans for this area must be approved in advance and in writing by the forest supervisor. Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved, and has marked or otherwise designated that which may be removed or destroyed. Timber cut or destroyed will be paid for by the permittee as follows: Merchantable timber at appraised value; young-growth timber below merchantable size at current damage appraisal value; *provided* that the Forest Service reserves the right to dispose of the merchantable timber to others than the permittee at no stumpage cost to the permittee. Trees, shrubs, and other plants may be planted in such manner and in such places about the premises as may be approved by the forest officer in charge.

4. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.

5. This permit is subject to all valid claims.

6. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

7. The permittee shall take all reasonable precautions to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the forest officer in charge or his authorized agent.

8. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the national forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.

9. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

10. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

11. Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and restoration of the site.

12. This permit is not transferable. If the permittee through voluntary sale or transfer, or through enforcement of contract, foreclosure, tax sale, or other valid legal proceeding shall cease to be the owner of the physical improvements other than those owned by the United States situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise reestablish title to said improvements, this permit shall be subject to cancellation. But if the person to whom title to said improvements shall have been transferred in either manner above provided is qualified as a permittee and is willing that his future occupancy of the premises shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, his continued occupancy of the premises may be authorized by permit to him if, in the opinion of the issuing officer or his successor, issuance of a permit is desirable and in the public interest.

13. In case of change of address, the permittee shall immediately notify the forest supervisor.

14. The temporary use and occupancy of the premises and improvements herein described may be sublet by the permittee to third parties only with the prior written approval of the forest supervisor but the permittee shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

15. This permit may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest Service.

16. In the event of any conflict between any of the preceding printed clauses or any provision thereof and any of the following clauses or any provisions thereof, the preceding printed clauses will control.

17. This permit is accepted subject to the conditions set forth above and to conditions 18 to 41 of the attached terms and made a part of this ~~xxxxxxxx~~ foregoing form Special Use Permit.

This permit is accepted subject to the above conditions

Date_____ Permittee_____

DATE	SIGNATURE OF ISSUING OFFICER	TITLE

GPO 910-314

FELDMAN, WALDMAN & KLINE
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, a non-profit California corporation,
Plaintiff,

vs.

WALTER J. HICKEL, individually and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually and as Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service; and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,

Defendants.

AFFIDAVIT

Civil Action

No. 51464

I, J. MICHAEL McCLOSKEY, being sworn, say as follows:

I presently am staff director of the Sierra Club. For the past three years, I have been its Conservation Director, and before that, I was assistant to the Sierra Club President.

Since February 1965, I have been a member of the Sierra Club Staff having primary responsibility to become and remain informed about proposed private developments of the Sequoia National Game Refuge area of the Sequoia National Forest. I have been the official spokesman for the Club on that subject. The area involved is known as Mineral King. Mineral King is

located 55 miles east of Visalia, California and is both geographically and ecologically part of the high Sierra. The game refuge of which Mineral King is a part is a 15,000 acre enclave bounded on three sides by Sequoia National Park. It is also ecologically and geographically part of the Park, and lies within the same watershed. It has essentially the same flora and fauna as the Park, including some giant Sequoias at lower elevations.

In February, 1965, the Forest Service of the United States, Department of Agriculture with administrative responsibility for the National Forests, issued a prospectus for a proposed winter and summer recreational development at Mineral King. This prospectus solicited bids from private developers for the construction and operation of a year-round recreation resort.

Commencing on June 7, 1965, the Sierra Club made written and telegraphic requests to the Forest Service for public hearings with respect to the policy considerations and desirability of a development of the type outlined in the prospectus and in the six bids received in response to it. Examples of these requests are attached hereto and bear the following dates and exhibit numbers:

Date	*Exhibit*
August 7, 1965	A
November 3, 1965	B

Each of the requests for hearing was denied.

In a letter of July 1, 1965, Regional Forester Charles A. Connaughton, writing to Dr. William E. Siri of the Sierra Club, stated: "On March 13, 1963 (sic), Congressman Hagen conducted a public hearing in Visalia to determine what could be done to expedite development. We have the record of this hearing and it discloses no opposition." (Attached hereto and marked Exhibit "C".) As more recently acknowledged by the Forest Service, the hearing was conducted in 1953 rather than 1963. (Information release entitled "Mineral King – A Planned Recreational Development", Forest Service, February 1969

hereinafter referred to as "February release".) It was not a congressional hearing, but rather organized by the Tulare County Chamber of Commerce. We are aware of no public hearing in which the advisability of the development of a commercial-recreational complex at Mineral King was the issue.

In December 1965, still without hearings, the proposal of Walt Disney Productions, Inc. ("Developer") to build a resort designed principally as a ski resort but for summer use also was selected from among the six bids received. In January 1966, the supervisor of the Sequoia National Forest granted it a three-year preliminary permit. The permit authorized Developer to make surveys and plans and provided that a thirty-year term special use permit covering not to exceed 80 acres and a supplemental "annual" or "revocable" special use permit for the development and operation of Mineral King would be issued prior to the expiration of the preliminary permit if the plans as submitted had been approved, if a contract had been awarded for a significant part of the necessary all-season road, and if funds had been programmed for completion of the road within five years of the award of the first road contract. A copy of said preliminary permit is attached hereto and marked Exhibit "D".

The Forest Service prospectus called for a certain minimum number of facilities which themselves would cause a seriously adverse impact upon Mineral King. I am informed and believe that no maximum has been established and Developer's proposal would result in an impact many times more serious. The prospectus called for four ski lifts; Developer's proposal was for twenty-two lifts and gondolas. The prospectus called for a parking capacity of 1,200 automobiles; Developer's proposal is for 3,600 vehicles. The prospectus called for resort accommodations for 100 overnight visitors; Developer's proposal contemplates a capacity of 3,310 persons. The Forest Service estimated a cost in the range of 3 million dollars. Developer presently plans to spend 35.3 million dollars to "develop" Mineral King. (Document entitled "Mineral King – A Planned Recreational Develop-

ment", Forest Service, February 1969.) The ultimate magnitude of the development cannot be predicted. In a brochure released in 1967, Developer stated:

> "When we go into a new project, we believe in it all the way. That's the way we feel about Mineral King. We have every faith that our plans will provide recreational opportunities for everyone.
>
> "All of us promise that our efforts now and in the future will be dedicated to making Mineral King grow to meet the ever-increasing public need. *I guess you might say that it won't ever be finished.*" (*Emphasis added.*) ("The Disney Plans for Mineral King, copyright 1967, Walt Disney Productions, attached hereto as Exhibit "E".)

On January 27, 1969, Developer's Master Plan, embodying the foregoing features, was approved by the Forest Service, with the only further condition precedent to the actual granting being the letting of the first contract for road construction on national forest land in the Mineral King enclave. I am informed and believe that this contract could be let at any time and certainly no later than by the end of the summer of 1969.

The Mineral King Valley covers an area approximately one-sixth the size of the valley at Yosemite National Park. I am informed and believe that Yosemite is visited in a peak weekend by 40 thousand persons. Projections of weekend usage at Mineral King are for 12 thousand persons. Thus, the concentration of persons at Mineral King will be almost twice that found at Yosemite. This concentration will occur at an elevation 3,800 feet higher than Yosemite where the short growing season and thinner air produce an extremely fragile ecology.

Surface access to Mineral King is available over a narrow, partially paved, two-lane, winding seasonal road in the vicinity of Hammond, California about 25 miles to the west. The road generally follows the East Fork of the Kaweah River to its Mineral King terminus. It was in existence for many years before the surrounding land was incorporated into the Park. On

July 16, 1965, the California Legislature voted to add Highway 276 to the State Highway System. That highway was intended to provide access to the Mineral King development. (Memorandum from Department of Public Works – Division of Highways, to California Highway Commission of September 8, 1967, attached hereto and marked Exhibit "F".)

I am informed and believe that on or about October 24, 1967, the California State Highway Commission adopted the recommendation of the Division of Highways and approved an all-weather, high-speed highway consisting of two lanes with half mile long passing lanes every few miles. The road, which will follow approximately the routing of the old road, is estimated to cost $25,000,000. This sum is payable by the State, with the exception of a $3,000,000 federal construction grant from the Economic Development Administration. The central 9.2 miles of the proposed routing is within Sequoia National Park, under the administrative jurisdiction of the National Park Service, U.S. Department of the Interior. East of Park, the routing is through the National Forest. (*Id.*) Attached hereto and marked Exhibit "G" is a drawing entitled "Route 276 Study" which depicts the road.

I am informed and believe that in December 1968, the Secretary of the Interior, without hearings, approved the route proposed by the State and further, that he intends to grant a final right-of-way permit within the next several days. This conduct is at odds with a regulation of the Department of the Interior adopted on January 28, 1969, which requires both corridor and design hearings with regard to major road projects in National Parks which have a substantial social, economic or environmental effect. It is equally at odds with the Secretary's announcement on April 26, 1969, that he is asking the National Park Service to revise its master planning procedures to provide for "broader public review and comment" on all phases of the National Park System, and not just roads. On April 21, 1969, the Secretary purported to revoke the regulation calling for

hearings in the case of road building. (News release attached hereto and marked Exhibit "H".)

I am aware of the following additional matters which will affect the unique park and recreational values of Sequoia National Park and the Sequoia National Game Refuge which have not been the subject either of hearing or of public explanation by the federal agency concerned:

FOREST SERVICE

1. *The Use Proposed for Mineral King by Developer is in Violation of its Status as a National Game Refuge:* The Sixty-ninth Congress, in connection with legislation regulating the management of Sequoia National Park, also established the enclave of Sequoia National Forest within which Mineral King is located as a game refuge with the purpose of the legislation "to protect from trespass the public lands of the United States and the game animals which may be thereon." (Act of July 3, 1926, P.L. 69-465, 26 Stats. Ch. 744, Sec. 6) The Secretary of Agriculture was left with the power to authorize other uses of the lands involved only "so far as may be consistent with the purposes for which said game refuge is established." (*Id.*) I am aware of no finding that the 35 million dollar project proposed by Developer which anticipates daily use exceeding 8,500 persons is a usage consistent with the status of the area involved as a game refuge, nor is such a finding rationally possible. I am aware that Mr. J. C. Fraser, Chief Water Projects Branch, Department of Fish and Game, State of California, has stated as follows:

> "Your fourth question regards the potential effect of development in the Mineral King Game Refuge on game. This Department has not made specific studies nor prepared reports regarding the effects of this development on wildlife. We can say, however, that *in an extensive development such as the Disney proposal, considerable wildlife habit would be lost and wildlife would suffer from human encroachment.*" (*Emphasis added.*)

(Letter of November 27, 1968, to Mr. B. K. Jones, copy attached hereto and marked Exhibit "I")

2. *The Forest Service has Agreed to Permit the Development with Permanent Facilities of more than 80 Acres of National Forest Property:* A Forest Service publication of February 1969 entitled "Mineral King – A Planned Recreational Development" states at page 8, as follows:

> "How Much Land Will The Disney Company Control?
>
> – It will not really control any. It will have
>
> – Under a thirty-year term permit permission to use a maximum of eighty acres upon which to erect *most* major facilities, and
>
> – Under an annual permit *it will be permitted to construct lifts* and trails throughout about 13,000 acres . . . " (*Emphasis added.*)

Moreover, the Forest Service sample "annual" or "revocable" permit attached to its Mineral King Prospectus states that it is issued for the purpose of:

> "Developing and maintaining ski slopes, trails, parking areas, refuse and sewage disposal areas, roads, etc., in conjunction with the facilities and improvements specified in Clause 22 of the foregoing Term Permit."
>
> (See copy of permit attached hereto and marked Exhibit "J".)

Based upon these publications, I am informed and believe that the Forest Service intends to permit the location of permanent facilities by Developer upon game refuge property outside of the 80 acres.

3. *The Proposed Road is a Serious Threat to Unique Redwood Trees Known as Sequoia Gigantea:* Mr. L. M. Whitfield, formerly the Supervisor of Sequoia National Forest, has stated that "Dr. Hartesveldt, a leading expert on the Sequoia gigantea, has studied the proposed location and design and sees no threat to any redwoods." (Letter May 15, 1968, to Mr. Jack Hope, a copy of which is attached hereto and marked Exhibit "K".)

Dr. Hartesveldt actually has said ". . . there are a total of at least 103 giant sequoias below the proposed highway. Of these, 45 are in a position of possible jeopardy because of road construction." (Hartesveldt, *Study of the Possible Changes in the Ecology of Sequoia Groves in Sequoia National Park to be Crossed by the New Mineral King Highway* for California Division of Highways dated December 19, 1966, attached hereto and marked Exhibit "L")

4. *The Development Would Produce a Severely Adverse Impact upon Mineral King in its Natural State:* Mineral King Valley is a U-shaped basin rimmed by 12,000 ft. peaks rising 3,000 to 4,000 ft. above the valley. It is an alpine setting reminiscent of the Alps. In proposing the development of Mineral King, Developer justified a bid fee of 2% of net receipts in part as follows:

> "Grooming and manicuring of most slopes without destroying the naturalness of the area, particularly for intermediates, will require extensive bulldozing and blasting in most lower areas and extensive rock removal at higher elevations. This is especially true for the Mosquito, Eagle, and White Chief Bowls and the lower Farewell Canyon area." ("A Proposal For The Development of Mineral King From Walt Disney Productions – 1965")

Attached hereto and incorporated herein is a sketch of Developer's master plan bearing the denomination "Exhibit E" and marked Exhibit "M" hereto. It depicts a portion of the "grooming" referred to in the foregoing quotation. It suggests the enormous interference with nature and with the game refuge status which is being proposed.

Some of the best evidence of the magnitude of the interference is to be found in Forest Service correspondence. Developer's Master Plan was submitted to the Forest Service on January 9, 1969. On January 21, 1969, the Forest Service Director of Wildlife Management stated to the Director of the Division of Recreation:

"After one quick review of the Mineral King Master Plan, I have a few comments to offer:

"1. *Horse concession.* – It appears that this could cause serious problems in sanitation and esthetics where there is very limited area in which to operate. Presumably, this would be a large operation involving at least 50 horses. The trails would have to be surfaced to control erosion. More serious, however, would be sanitation and the need to supply all needed forage.

"2. *Alternatives for sewage disposal.* – The plan shows 2 primary sewage facilities and provides that effluent will be filtered through soil enroute to the stream drainage. With the large quantity of daily sewage discharge expected, I would question whether the soil can adequately handle the effluent. Should alternatives be considered, such as piping effluent out of the canyon, etc.?

"3. *Check dams to collect debris.* – The Plan is not clear on the purpose or function of these dams. Presumably they are to prevent damage from flooding and from debris accumulation. Is a dry-dam type structure planned? Also, what is the source of the debris? Will it result from timber cutting on the ski runs?

"In conclusion, *I would hope that we study the impacts of this concession for a long time before permitting another one.*" (*Emphasis added.*)

(Memo of W. O. Hanson to Richard J. Costley of January 21, 1969, attached hereto and marked Exhibit "N")

Also on January 21, 1969, the Director of Range Management wrote:

"To what degree has the compatibility of planned horse programs with resource needs been determined? The projected use by people, in itself, will have a very real impact on these fragile soils and vegetation without the additional effect of horse use. Any horse activity as well as others influencing soils and vegetation could well utilize the services of an ecologist during the planning stage."

(Memo of R. M. DeNio to Richard J. Costley of January 21, 1969, attached hereto and marked Exhibit "O")

The Master Plan was approved by the Forest Service six days later, on January 27, 1969.

Chief of the Forest Service Division of Recreation, and deeply involved in the Mineral King project, is Mr. W. S. Davis. On January 9, 1967, he wrote to the Sequoia National Forest Supervisor, in part, as follows:

> "Engineering may not have been aware that in accepting the Disney proposal, we agreed to the concept of a village with underground automotive service facilities for deliveries, maintenance, etc. *This brings with it a need for land modification, earth moving, and possibly stream channel changing beyond what we might normally permit.* The underground roadways and chambers must either be tunneled or built partially on the surface, boxed in and backfilled. The report favors the latter, *which means a great deal of earth and debris moving.* But we can require that all this be accompanied by an effective landscaping program.
>
> ". . . The impact is certain to be heaviest at the village site and on the valley floor. By accepting the development proposal we have also accepted that some effect on fishery values, streamflow, vegetation, soil, and other resources must be provided for." (*Emphasis added.*)
>
> (Memorandum attached hereto and marked Exhibit "P")

On January 6, 1967, the Range & Wildlife Management section of the Forest Service wrote to the Recreation section with respect to preliminary site studies at Mineral King, as follows:

> *"The total basic concept of development appears badly biased in orientation toward a highly artificial, continued situation, without any real attention to ecological factors and needs to multple use management.* The extent and nature of proposed alteration of the basin is unacceptable to us – the damages extend beyond effects on fish and wildlife, and these alone are critical.
>
> "Specifically, stream diversions and channel treatment, flood and debris control, surface water supply

development, and sewage disposal proposals are all of a nature we find severely damaging or unacceptable.

"It is recognized that development of high intensity year-round recreational use in this restricted fragile sub-alpine area is bound to result in pronounced impacts and certain unavoidable changes." (*Emphasis added.*)

(Memorandum attached hereto and marked Exhibit "Q")

I am informed and believe that no significant changes in Developer's proposal have been made in response to the foregoing critical comments, some of which were made over two years ago.

5. *The Avalanche Danger Presented at Mineral King has not been Adequately Considered:* Mineral King has been identified as an area of high avalanche danger. (Hasher-Gibson *Winter Survey 1947-48* for Mineral King, Sequoia National Forest.) Attached hereto and marked Exhibit "R" is a plat showing such avalanches in the winter of 1947-48, a year of light snow. This winter has witnessed the death of the occupant of a cabin owned by Developer located on the proposed site of the village which is part of its proposal. Within the last several weeks, a number of structures in Mineral King Valley have been destroyed or heavily damaged by avalanches.

On November 18, 1966, Mineral King Staff Specialist P. J. Wyckoff wrote to Developer with respect to preliminary site studies. He stated in part, as follows:

"The original premise was that the new village would straddle Monarch Creek extending down to Coral Rock. This, of course, puts the village across the present avalanche path."

(Letter attached hereto and marked Exhibit "S")

6. *The Forest Service Did Not Complete Ecological Studies Relating to the Location of Unusual Species and Fragile or Scarce Habitats and the Means of Protecting Them Prior to Approving the Project:* I am informed and believe that there have been no studies completed within the Sequoia National

Game Refuge which are pertinent to these subjects. Support for this belief includes the memorandum of January 6, 1967, quoted in part at page 10, *supra.*

7. *To the Extent that is has Attempted to Assess the Impact of Developer's Program upon Mineral King, the Forest Service has Failed to Add in the Impact of an Adjacent Development to be Located on Privately Owned Property:* I am informed and believe that the owners of 160 acres of land in the Silver City area within three miles of the area of Developer's proposed project are planning a residential-commercial development which will include condominium apartments and a motel lodge with a capacity of 1,000 persons overnight, a shopping center and a service station. On May 1, 1969, the "Visalia Times-Delta" reported that this project, under consideration by Tulare County, will cost 20 million dollars. I am informed and believe that the impact of this project has not been considered in studies of impact upon Mineral King and upon the National Park and National Forest across which the access road to it would be built.

NATIONAL PARK SERVICE

1. *The Proposed Access Highway as it Crosses Sequoia National Park: Does Not Serve a Fundamental Park Purpose:* The road is intended to provide access from one point outside the park to a private development on the other side. It was not proposed by the Park Service, was not designed primarily and fundamentally to serve the Park, and any benefit to the Park is incidental. The portion of the Park through which it travels was not the subject of development plans at the time that the road was first proposed, nor is it now.

In 1967, the Director of National Park Service requested that a committee establish standards for guidance and control of construction and use of park roads. The result of that request was a report on April 11, 1968, from the Park Road Standards Committee. That report was forwarded to the Secretary of the Interior with the request that he give his approval and that the

recommendations be implemented within the Department immediately. He did approve recommendations including the following:

> "The Service needs to communicate widely that parks are for leisurely travel and that park roads are purposely designed for low speed . . . people need also to appreciate that the purposes of park roads are completely different from those of the Federal and State system. Park roads are not continuations of the State and Federal network. They should neither be designed – nor designated – to serve as connecting links. *Motorists should not be routed through park roads to reach ultimate destinations.* Within parks, no road or other circulation system should be designed simply as a connecting device to link points of interest . . . (*Emphasis added.*)
>
> "*Approval of Design and Construction* 'To insure that all National Park roads, or other circulation systems, are in harmony with fundamental park purposes, the following considerations must precede approval of design and construction:
>
> '1. A professional ecological determination must be made that the resulting effects on park values – including such aspects as wildlife habitat and mobility, drainage, stream flow, and climatic effects of paved areas – will be minimal.' " (*Emphasis added.*)

I am informed and believe that none of the prescribed standards have been met in the case of the Mineral King Highway.

2. *There Remains Confusion Between Park Service and Forest Service Concerning the Capacity, Size and Operational Limits of the Road which Will Lead Either to the Conclusion that There is Not Enough Access to Make Mineral King Profitable or that an Even Wider and Immensely More Damaging Highway Must Be Established.* For several years, the Department of Interior refused to approve a right-of-way across Sequoia National Park; when it finally did, the Department made clear that the road must be limited to two lanes without any passing lanes. See letters dated October 16, 1968, and November 19, 1968, from the Secretary of the Interior to the

Secretary of Agriculture, a letter dated November 19, 1968, from Edward A. Hummel to Edward P. Cliff and a letter dated April 1, 1968, from Karl T. Gilbert to James C. Cooper, these letters being attached hereto and marked Exhibits "T" through "W", respectively. It insisted that the State of California adhere to the design standards established by Mr. John Clarkeson, a consulting engineer in highway design. Mr. Clarkeson's report contains the following observations:

> "The primary purpose of the proposed highway is to serve the Mineral King development. It is anticipated that up to 14,000 persons will be served here each day. Of these, approximately two-thirds will be day-time visitors (traveling to and from the area in the same day), and one-third will be overnight visitors staying one or more nights at Mineral King.
>
> "In addition, at Silver City, at the approach to Mineral King Canyon, there is proposed another development of year-round residence units, the present number of which has not been firmed up. There are privately-owned camps, ranches, etc., along the transportation corridor; these are few and far as their effect in traffic load is concerned, but they must be considered by any future undertaking . . .
>
> "My observations on Route 198 from Visalia to Three Rivers on my visit to the area confirms my past experience with this type of design. The safety lane as designed by California is, in my opinion, very *un*safe and should not be used . . .
>
> "Regarding the entire design, our information is that the single directional peak hour flow *is anticipated at 850 vehicles per hour. This is a very high one-directional load for a two-lane highway and can be handled only with reasonable traffic control.* Further, if two-thirds of the 14,000 daily visitors to the Mineral King area go in and out within one day, this will place a load of 9,400 visitors making a round trip in 2,500 vehicles. To keep the hourly peak to 850 per hour, only one-third of these can leave in any one hour . . .
>
> "Unless some control or other means is considered this two-lane road does not look at all adequate for a

> 14,000-a-day visitor load where so many will be one-day visitors." (*Emphasis added.*)
>
> (*Report on Road to Mineral King,* The Clarkeson Engineering Company, Incorporated, attached hereto and marked Exhibit "X")

Meanwhile, the Forest Service was stating that:

> "The peak load capacity would be about 1,200 cars per hour." (Forest Supervisor L. M. Whitfield's letter of May 15, 1968, to Mr. Jack Hope, Exhibit "Y".)

This inconsistency on a matter which is regarded as the key limiting factor in the use of Mineral King is importnat because the immediate pressure upon the Park Service to establish additional lanes either by reason of financial difficulty or a perpetual traffic snarl at Mineral King would be difficult to withstand. Four lanes would result in the devastation of the entire corridor of Sequoia National Park across which the road would be located.

3. *The Road Would Produce a Severely Adverse Impact upon the Park in its Natural State.* As stated in the Clarkeson report:

> "Obviously, any road construction to present-day standards could not be built through this area without affecting the ecology of the area. Within the road prism (cuts and fills) plant life would, of course, be disturbed, and since the top soil for regenerating plant life is sparse, early vegetative cover on cut and fill slopes would be very slow in developing.
>
> "More than that, the road, if primarily based on cut and fill construction, would be a barrier to wild life and visitor movements throughout this area of the park. Animals and men would have to cross the road to the risk not only of such persons and wild life but also to the risk of users of the highway. (Report on Road to Mineral King, *supra.*)

4. *Developer Must Rely upon a Future Approval by Congress of a Power Line Crossing Sequoia National Park.* Based

upon a statement made to me on April 25, 1969, by Rober D. Hicks, Project Manager for Developer, I am informed and believe that Developer's intention is to meet the electrical needs of the Mineral King development by contracting for the location of a 66,000 volt power line *across* Sequoia National Park in the general vicinity of the proposed road. I am aware of no authorization by Congress to permit such a power line.

Congress presently has before it proposed legislation establishing Sequoia National Game Refuge as a part of Sequoia National Park. I am informed and believe that the granting of permits and approvals to permit construction of the development and of this road would cause a diminution of the very park values presently being considered by Congress.

J. MICHAEL McCLOSKEY

J. MICHAEL McCLOSKEY

STATE OF CALIFORNIA
CITY AND COUNTY OF
SAN FRANCISCO } ss.

Subscribed and sworn to before me
on June 4, 1969.

LINDA A. UMBERTUS

Notary Public

LINDA A. UMBERTUS
NOTARY PUBLIC - CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
My Commission Expires January 20, 1973



by Ansel Adams in The Sierra Nevada: The John Muir Trail

SIERRA CLUB

Mills Tower, San Francisco 4

August 7, 1965

Mr. Edward Cliff, Chief
Forest Service
Department of Agriculture
Washington, D.C.

Dear Mr. Cliff:

On June 7 the Sierra Club wrote to the Regional Forester for Region 5, Charles Connaughton, requesting that bids not be accepted on the proposed ski development at Mineral King in the Sequoia National Forest until a public hearing is held on the desirability of such developments at that site. On July 1, 1965 Mr. Connaughton replied with a denial of that request.

The Sierra Club hereby appeals to you to have Mr. Connaughton reconsider his denial and grant our request. We believe that our request for a hearing is meritorious and that Mr. Connaughton's denial is based on a number of misapprehensions of fact. We are attaching a copy of his letter of denial. We believe that it is both desirable and practical to hold a hearing despite the fact that bids are to be received on August 31, 1965. We suggest that no action be taken on acceptance of a bid for a six month period during which a hearing be held to allow the public to consider the various development proposals put forth and their impact on the fragile area. The specific reasons that cause us to believe that a hearing is needed and the procedures we suggest are detailed below.

One. Though there is no requirement in present federal regulations that public hearings be held on management decisions on the national forests, it is sound public policy to hold hearings on major management decisions. This ensures that the Forest Service is responsive to public wishes in exercising its broad delegated authority. A growing number of Congressional directives that public notice and hearings be held on reservation and policy questions makes it clear that Congress wants the public to be consulted in advance of major policy decisions affecting the national forests. Moreover, there is ample precedent for the Forest Service holding such hearings. In recent years hearings have been held on both the Hixon (Oregon) and Lincoln Backcountry (Montana) areas involving development of undedicated but relatively undeveloped national forest land.

Indeed, it is coming to be Forest Service policy to hold hearings on important land use questions when there is sufficient public interest. The question of whether the Mineral King area should be developed is an important land use question for these reasons:

(1) Mineral King has special natural characteristics and recreational attributes of great value not found elsewhere. They are described by a recent visitor in the following manner: "Although their scenic and ecological features are reminiscent of many other Sierra regions, Mineral King and environs are

EXHIBIT



by Ansel Adams in The Sole American Book

unique. They are unlike any other roadhead that we have ever visited. Where else in the Sierra does a primitive roadhead reach to the headwaters of a major river (east Fork of the Kaweah)? Where else does a road provide such direct access to so many alpine passes (five or more)? Yet the two mile long valley is essentially unspoiled. Mineral King's U-shaped basin is rimmed with 12,000 foot peaks rising 3000 to 4000 feet above the valley from whose flanks streams, cascades, and torrents tumble into the narrow floor, which is mainly a flood plain and wash for the river. A number of lakes are within less than a two hours walking distance of the valley, which is a trail center where at least seven routes radiating in all directions open up the southern part of Sequoia-Kings Canyon National Park, Sequoia National Forest, the magnificent Big Horn Sierra to the west, and the Little Horn territory below Farewell Gap. The massive, self-contained ecological unit of Mineral King itself (protected in a National Game Refuge) and the surrounding country are one of the finest wilderness-type areas we have ever seen" (Frederick Eissler, July 1965).

(2) The question of what happens to Mineral King becomes additionally important when the magnitude of the developments envisaged are considered. By the year 2000 with the planned developments, the Forest Service recreation plan foresees over 1 million visitors annually crowding into this small valley. Up to 14,000 visitors on peak days are foreseen bringing 5,000 cars onto the 51 acres of development land. Whether such a crushing impact should be invited is an important question.

(3) Finally the question of developing Mineral King becomes important because of the immense sums that may become involved in its development. Some estimate that up to $20 million may be spent on developments at the site alone, with estimates of the cost of the access road running as high as $25 million. Proposals to invest possibly as much as $45 million on public lands should be subjected to thorough public scrutiny.

Two. The Mineral King area deserves the added consideration of a public hearing because Congress has made it clear that it wants this land treated more as a park than as regular national forest land, though it has left the land under the jurisdiction of the Forest Service. Because of the mineralization of the area and its mining history, the area was not added to Sequoia National Park though it is an enclave within it. However, the management of the area was treated in the Act of July 3, 1926 relating to the management of the park. The Act established the Mineral King area as a federal Game Refuge and directed the Forest Service to protect the animal life there as within the National Park. The reasons that caused the area to be left out of the park plus the special legislation dealing with it in conjunction with the park suggest that Congress wants the area and its natural character given special care. Proposals to alter that character, thus, should be subjected to ample public scrutiny.



by Ansel Adams in The Sierra Nevada Book

SIERRA CLUB Mills Tower, San Francisco 4

Three. Despite occasional consideration of proposals to develop Mineral King over the last two decades, there has been very little public understanding of what is involved. As conservation groups have begun to perceive the magnitude of the impact planned, opposition has begun to mount. Most visitors quarried recently at the site have opposed the planned developments. Many cabin owners there oppose it. Some newspapers do. It has been widely implied that no one, perhaps excepting the Sierra Club, opposes the development of Mineral King. This is not true. A public hearing would reveal accurately what the balance of public opinion is.

In his letter of July 1 to us, Regional Forester Connaughton says: "On March 13, 1963 Congressman Hagen conducted a public hearing in Visalia to determine what could be done to expedite development. We have the record of this hearing and it discloses no opposition." This statement is inaccurate. The hearing was not held in 1963 but 1953. Thus there has been no hearing on the question in over a dozen years. Moreover, the hearing record does disclose some opposition, particularly among cabin owners.

The 1953 hearing cannot be regarded as a fair hearing on the question now before the public. The question at that hearing was one of choosing between two alternate development plans: one for light development and the other for intensive development. The question now is whether development should take place at all. The 1953 hearing was not a Congressional hearing as Mr. Connaughton implies. Rather it was organized by the Tulare County Chamber of Commerce to promote development. Invitations were sent to those interested in promotion. It is no wonder that little opposition is found in the record. Of the 82 invitations extended by the Chamber, only 3 went to conservation groups. None made unequivocal statements of support. A staged meeting by a Chamber of Commerce held a dozen years ago to boost development plans that are now obsolete can hardly be regarded as a federal model of an impartial and timely hearing on an important question of public policy.

A new hearing should be held now on the plans currently under consideration with fair notice to all of the interested public. The hearing should be organized by the public agency responsible, not by interested private parties.

Four. Regional Forester Connaughton suggests that as Forest Service planning for the Mineral King area has been continuous since 1949, there has been adequate public knowledge of the direction and intent of Forest Service management. As a member of the public, the Sierra Club must say that its knowledge of the record does not show continuous planning but a discontinuous situation. Following issuance of a prospectus in 1949 and failure to attract



by Ansel Adams in The John Muir Trail

SIERRA CLUB Mills Tower, San Francisco 4

any qualified bidders, plans to issue a new prospectus in 1952 were dropped. Not until the 1960's was planning on the project resumed with the preparation of a multiple use plan providing for development there and the sudden issuance of a prospectus in February of this year. Most curiously, the prospectus was issued before a recreation management plan for the area was completed (not completed until June 10, 1965). Thus much of the planning for the area is of recent origin, and the public has not had time to absorb its implications. In fact, the issuance of the prospectus prior to the completion of the functional plan for recreation management in the area suggests some deliberate intent to rush development forward rather than a proper observance of the sequence of planning.

The new recreation management plan foresees a range and magnitude of development not heretofore envisaged. The predictions of visitation by the year 2000 bring the public policy choices into clear perspective. With the completion of this plan and the preparation of specific development schemes, the public has concrete alternatives before it. Those alternatives deserve to be presented at a public hearing so that all may understand what is at stake.

Five. Many important questions of public policy need airing at a hearing. Among the most important are these:

(1) Can the Mineral King area accomodate the intensities of usage that are predicted to come with development without undue damage to the natural ecology of the area? It is a fragile timberline area.

(2) Is it in the public interest to trade the semi-wilderness character of the Mineral King area for massive development and commercialization? Would development of other sites serve skiing adequately (such as Brush Cabin, Jordan Peak, Weaver Lake, and Sherman Peak)?

(3) Has the avalanche danger of the area been adequately studied? The only winter study done of the area was done by Ludvig Mosher in 1947-48. The winter was an exceptionally light one and not typical of normal conditions. Though the report felt the avalanche hazard that winter was controllable, it also recommended further winter study before development was permitted (recommendation #10, pl 12; see also pages 6-7: "Mineral King Sequoia National Forest Winter Survey, 1947-48," by Ludvig J. Mosher and James W. Gibson, July 1948). Have further winter studies been completed to adequately guarantee public safety?

(4) As the excessive costs of a modern access road have been the principal deterrent to development in the past, is the Forest Service inviting pressures for federal subsidies to develop the access road by continuing to issue prospectuses? Though the Forest Service denies this intent, will the effect of the development proposal be that the federal government will end up



by Ansel Adams in the Sierra Nevada Book

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-4-

paying a share of the access road costs to "bail out" private investors?

(5) Though the Forest Service plans to try to limit the extent of developments, will the presence of them nevertheless generate irresistible pressures for further satellite commercialization? How will control be exercised and maintained?

Sir. Despite the fact that bids will be received on August 31 of this year, there is still an opportunity for a hearing to be held. The fact that the Forest Service has invited bids does not obligate it to accept any of them (see such a disclaimer on p. 3 of the prospectus). All the Forest Service is obligated in good faith to do is to study them closely to see whether they meet its notions of public need. A hearing will help the Forest Service be sure it is correct in estimating public need.

On receipt the Forest Service can notify the bidders that no decision on acceptance of any of them will be made for a six month period. Then sometime early this fall the Service can schedule a public hearing at a principal city in the area and explain the provisions of its multiple use plan, recreation plan, and development prospectus. Then it can compare and explain the development schemes proposed. The developers themselves then could be invited to comment in turn. Following that, the interested public would be invited to comment. Advertisements for the hearing would be widely circulated to all interested parties and throughout the press.

Following the hearing, the Forest Service could evaluate the hearing record and make a judgment about public need and desires. This judgment could lead to acceptance of one of the bids, or modification of its previous plans, or rejection of all of the bids. But whatever it did, the Forest Service would have the assurance that it acted with understanding of the public's wishes and that it had acted fairly.

All that the Sierra Club asks is that a fair procedure, and one with ample precedent, be employed. We are confident that the benefit of a hearing will redound both to the public and the Forest Service.

Very truly yours,

Michael McCloskey
Assistant to the President
for the President

cc: Charles Connaughton
Secretary Orville Freeman

John Harper
Fred Ei[illegible]r
R. Ives
Bob Marshall
Sen. Kuechel

Cong. J. Cohelan
Cong. John Moss

TELEGRAM

M. McCloskey
Sierra Club
1050 Mills Tower
San Francisco, California

November 3, 1965

Honorable Orville Freeman, Secretary
Department of Agriculture
Washington, D.C.

YOUR PRESS RELEASE OF OCTOBER 27 REGARDING DEVELOPMENT OF A SKI RESORT IN THE MINERAL KING AREA OF CALIFORNIA HAS JUST COME TO OUR ATTENTION. SIERRA CLUB IS DISTURBED AT IMPLICATION IN THE RELEASE THAT A DECISION HAS DEFINITELY BEEN MADE TO GO AHEAD AND GRANT A PERMIT TO ONE OF THE BIDDERS. AT OCTOBER 22 MEETING WITH ASSISTANT SECRETARY JOHN BAKER WE WERE LED TO UNDERSTAND THAT THE QUESTION OF WHETHER TO GO AHEAD WITH DEVELOPMENT WAS STILL AN OPEN QUESTION, AS WELL AS THE QUESTION OF TO WHOM A BID MIGHT BE AWARDED IF THE DECISION WERE MADE TO GO AHEAD.

DECISION TO GO AHEAD RAISES DISQUIETING QUESTIONS ABOUT THE DEPARTMENT'S POLICIES OF PROVIDING FOR PUBLIC PARTITICIPATION IN THE DECISION MAKING PROCESS. THE DEPARTMENT HAS REPRESENTED THAT IT IS ITS POLICY TO HOLD PUBLIC HEARINGS IN ADVANCE OF DECISIONS ON MATTERS OF SIGNIFICANT PUBLIC INTEREST. SURELY IF THERE WERE EVER SUCH A MATTER, THIS IS IT.

THE QUESTION IS SIGNIFICANT FOR THREE REASONS. ONE, LAND USE PATTERNS OF A FRAGILE AREA WITH A SPECIAL LEGISLATIVE HISTORY SIMILAR TO THE PARK THAT SURROUNDS IT ARE BEING DRASTICALLY CHANGED. VISITOR DENSITIES UP TO 14,000 PERSONS PER DAY ARE BEING INVITED. TWO, GREAT SUMS OF MONEY FOR COMPETING PLANS AND CONCEPTS ARE AT STAKE, INVOLVING PERHAPS $40 MILLION, WITH POSSIBLE PUBLIC OBLIGATIONS INVOLVED AS WELL. THREE, ADMINISTRATION PROPOSALS FOR THE AREA HAVE BEEN WITHHELD FROM THE BROAD PUBLIC UNTIL LINES OF COMMITMENTS WERE ALREADY UNDERTAKEN.

THESE COMMITMENTS ARE STILL NOT IRREVOCABLE. THE PUBLIC HAS A RIGHT TO KNOW AND EXPRESS ITSELF BEFORE SUCH CRITICAL DECISIONS ARE MADE. IF HEARINGS ARE NOT HELD ON QUESTIONS AS MOMENTOUS AS THE FUTURE OF MINERAL KING, THEN THERE IS LITTLE HOPE THAT THEY WILL BE HELD ON OTHER QUESTIONS TOO. A MATTER OF PRINCIPLE IS AT STAKE: THE PUBLIC'S RIGHT TO BE HEARD AT THE RIGHT TIME AND BEFORE THE RIGHT FORUM. WE ARE LOOKING TO YOU TO HONOR THIS PRINCIPLE.

Michael McCloskey
Conservation Director
Sierra Club

EXHIBIT B

-(X)-3c file

RECEIVED JUL 2 1965

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
CALIFORNIA REGION
630 SANSOME STREET
SAN FRANCISCO, CALIFORNIA 94111

IN REPLY REFER TO

2310
July 1, 1965

Dr. William E. Siri
Sierra Club
Mills Tower
San Francisco, California

Dear Dr. Siri:

I have your letter of June 7 outlining the action taken by the Board of Directors on May 1 - 2.

As some members of your Board know, the recreation development of Mineral King has been foremost in Forest Service planning since before 1949, when the first development prospectus was issued. At that time no bids were received. On March 13, 1963 Congressman Hagen conducted a public hearing in Visalia to determine what could be done to expedite development. We have the record of this hearing and it discloses no opposition.

Subsequently, the Sequoia National Forest incorporated winter recreation development of this area as a major feature of a multiple use plan which was prepared months ago. Recently a prospectus has been issued inviting bids for development. Prior to issuance of this latest prospectus all public agencies which might be affected were consulted, including the National Park Service. Their concurrence was obtained. Consultation on this matter with representatives of the Sierra Club has taken place at intervals, as many of your members know. I outline these deliberations and actions merely to indicate the widespread consideration which has been involved in relation to Mineral King development.

I know the Sierra Club is well aware of the public demand for additional ski areas, particularly tributary to the southern portion of California. Mineral King development is a real step ahead in supplying this need. Plans for the development are well known and of long standing. Our prospectus was issued soliciting bids under certain conditions. To hold another public

EXHIBIT C

1, 9-11

hearing at this stage would not be consistent with the long standing situation or current action in relation to the prospectus.

Under the circumstances we regret that we cannot accede to your request for a hearing. I am sorry that in this instance the Directors of the Sierra Club may be in disagreement with our program and procedure. Whether or not any development as a result of the present prospectus will occur, can't be predicted with accuracy at present.

Sincerely yours,

CHAS. A. CONNAUGHTON
Regional Forester

U.S. Forest Service — Department of Agriculture

SPECIAL USE PERMIT

Act of June 4, 1897, or February 15, 1901
This permit is revocable and nonassignable

NAME OF PERMITTEE	TYPE OF USE
Walt Disney Productions	Winter Sports (Survey)
DATE OF PERMIT: January 10, 1956	FILE CODE: 2710

REGION	STATE	FOREST	RANGER DISTRICT
5	California	Sequoia	Tule River

Permission is hereby granted to Walt Disney Productions, a corporation,

of 800 South Buena Vista Street, Burbank, California,

hereinafter called the permittee, to use subject to the conditions set out below, the following described lands or improvements:

National Forest land at the headwaters of the East Fork of the Kaweah River, commonly known as the Mineral King area, in the Sequoia National Forest (T. 17 S., R. 31 E., MDM)

This permit covers (as needed) acres and/or _____ miles and is issued for the purpose of:

Making detailed surveys and plans for the development of a winter and summer recreation development meeting the minimum requirements of the Mineral King Prospectus of February 1965.

The exercise of any of the privileges granted hereby constitutes acceptance of all the conditions of this permit.

1. In consideration for this use, the permittee shall pay to the Forest Service, U.S. Department of Agriculture, the sum of Twenty-three thousand eight hundred thirty-three and 37/100 Dollars ($ 23,833.37) for the period from February 1, 1966, to February 28, 1966, and thereafter annually on January 1

twenty-five thousand and no/100 Dollars ($ 25,000.00):

This payment is not subject to refund. However, each year $25,000.00 of the annual sum applies on a carry-forward basis as a credit for fees due in future years under the conditions of the term permit if issued as specified in clause 17.

EXHIBIT D

2. [illegible] under this permit shall begin within 1 month, and [illegible] shall be completed within 36 months, from the date of the permit. This use shall be actually exercised at least 30 days each year, unless otherwise authorized in writing.

[illegible] Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved, and has marked or otherwise designated that which may be removed or destroyed. Timber cut or destroyed will be paid for by the permittee as follows: Merchantable timber at appraised value; young-growth timber below merchantable size at current damage appraisal value; provided that the Forest Service reserves the right to dispose of the merchantable timber to others than the permittee at no stumpage cost to the permittee. [illegible]

4. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge [illegible] any approved survey [illegible]

5. This permit is subject to all valid claims.

6. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

7. The permittee shall take all reasonable precautions to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the forest officer in charge or his authorized agent.

8. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the national forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.

9. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

10. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

11. Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and restoration of the site.

12. This permit is not transferable. [illegible]

13. In case of change of address, the permittee shall immediately notify the forest supervisor. [illegible]

14. This permit may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest Service.

15. In the event of any conflict between any of the preceding printed clauses or any provision thereof and any of the following clauses or any provisions thereof, the preceding printed clauses will control.

16. This permit is accepted subject to the conditions set forth above and to conditions 17 to 19 attached hereto and made a part of this permit.

DATE	SIGNATURE OF ISSUING OFFICER	TITLE
January 10, 1956	[signature]	Forest Supervisor

[illegible]

17. A 30-year term special use permit covering not to exceed 80 acres, and a supplemental terminable area special use permit, will be issued to the permittee upon the completion of the following requirements:

(a) Approval by the Regional Forester of plans which meet or exceed the minimum requirements of the Mineral King Prospectus of February 1968, which is on file in the Supervisor's Office.

(b) Award of the first contract within three years of the date of issuance of this permit for improving, to public winter access standard, the authorized State route from the vicinity of Hammond, California, to Mineral King, this contract to cover a significant portion of said road.

(c) Programing of funds for completion of said road to public winter access standards within five years of the award of the first road contract.

The term permit will not be issued unless all three of the above requirements are met.

18. This permit will automatically terminate with the issuance of the permits described in Clause 17, and will in any event terminate three years from the date of issuance.

19. This permit shall have no force or effect until it has been signed by the permittee and the Forest Service.

WALT DISNEY PRODUCTIONS, a CORPORATION

Date

By _____
President

[Corporate Seal]

Attest:

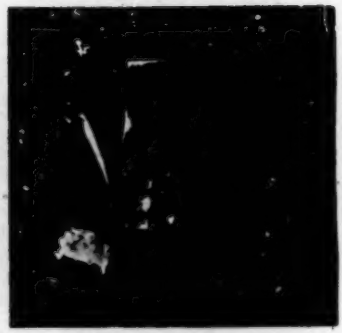
_____
Secretary

I, Luther R. May, certify that I am the _____ Secretary of the Corporation that executed the above permit; that Ray D. Upton, who signed said permit on behalf of said corporation, and then President of said corporation; that I know his signature, and that his signature on said permit is genuine; and that said permit was duly signed, sealed, and attested to for and on behalf of said corporation by authority of its governing body.

[CORPORATE SEAL]

Luther R. May
Secretary


Mineral King





High Sierra wonderland

Unsurpassed in natural splendor, Mineral King is perhaps more similar to the European Alps than any other area in the United States. Altitudes range from the 7,000-foot valley to surrounding mountains that reach the 12,400-foot level. The High Sierra wonderland, located in Sequoia National Forest, is generously endowed with lakes, streams, cascades, caverns and matchless mountain vistas.

Recognizing that Mineral King's alpine character will always be its greatest asset, Disney's staff is developing a master plan for year-round recreational facilities which will actually enhance the beauty of the area. Their plan is designed to preserve the natural beauty of Mineral King and to make it accessible to more than the limited number of people who now enjoy its unparalleled qualities.

Located within a four- to five-hour drive from the Los Angeles and San Francisco metropolitan centers, Mineral King will attract an estimated 1.7 million visitors annually when it is fully developed. Of this number about 800,000 will come from out of state.

Skier's paradise

Mineral King's high altitude gives the area one of the longest season snow periods west of the Rockies. And many experienced skiers say its slopes rival any in the world.

Some of the longest ski runs in North America will be developed from the rims of nine surrounding bowls to Faculty Flat, gateway to Mineral King Valley. *Some will be more than four and one-half miles long.*

Preliminary estimates indicate that, when fully developed, its slopes will easily accommodate up to 20,000 skiers at one time.

Preserving its beauty

Walt Disney's Mineral King plan calls for all structures to be styled along the lines of the Swiss chalet in keeping with their alpine setting. The chalet design will be somewhat influenced by contemporary American architecture.

One of the most important considerations in the unique Disney concept is the exclusion of visitor automobiles from Mineral King Valley – another

Mineral King in the 1970's

Walt Disney Productions estimates that a capital investment exceeding $35 million will be required to develop Mineral King in accordance with the Disney proposal. By 1978, projected as the first year of full operation, the initial phase of the project will include...



MINERAL KING VILLAGE, a completely self-contained complex with its own chapel, including rink, convenience and specialty shops, conference center, theatre, general store, post office and lodging accommodations for those in all income brackets;



20 SKI LIFTS (serving campers, night-owls, picnickers, and wild-life enthusiasts during warm months), placed for the greatest enjoyment, convenience and safety of beginner, intermediate, advanced and expert skiers;

approach to avoid distraction from its beauty. Visitor vehicles will be parked in a large area conveniently near the Valley entrance.

Since no visitor cars will be admitted to the Valley, widely experienced Disney engineers will design a public conveyance to speed guests from the parking area into and through Mineral King. They will create a system that will be aesthetically pleasing and in keeping with the scenery.

Project status

On December 17, 1965, U.S. Secretary of Agriculture Orville Freeman announced that Walt Disney Productions had been selected by the United States Forest Service to develop Mineral King.

The Forest Service then granted the Disney organization a permit expiring in January, 1969, to finalize plans for the development. Also by that deadline, the first contract must be let for construction of State Route 276 from Three Rivers to Mineral King. This new all-weather road, 20 miles in length, will make possible year-round access to Mineral King.

Since obtaining the planning permit, members of the Disney staff and their consultants have conducted a wide variety of on-site surveys of snow and weather conditions, soil and terrain, to provide information needed before detail planning and construction can begin.

Disney staff-members and consultants are also studying recreational areas throughout the world to collect data for use in finalizing plans for Mineral King.

When the master plan is approved and the first contract awarded on the new road, the Forest Service will issue a 50-year term permit to Walt Disney Productions, and will have, at all times and in every way, full approval of the Mineral King development. These two organizations will work in concert to meet the public need.

Plans call for a village and initial ski facilities to open at Mineral King in the winter of 1973-1974, concurrent with the completion of the new access road.

In 1973, eight ski lifts will begin operation, taking skiers to four major bowls from the valley floor. These bowls will easily handle up to 7000 skiers at one time.

There will also be accommodations for as many as 1500 overnight guests by that year.



MAJOR HOTELS AND LODGES – offering luxury and medium-price category accommodations – oriented to views of mountain gaps, river gorges, ski slopes and sports activities;

TEN RESTAURANTS located throughout the areas for year-round use;

SNOW PLAY AREA, conveniently located near the Village and away from ski areas, where several hundred people may engage in their favorite snow activities – tobogganing, sled rides and fun with specially designed equipment;

AND, along with auxiliary services, a conveniently located ski school facility with ski and locker rentals, first-aid station, hospital and Forest Service office.

Mineral King Village will feature chalet architecture

Walt Disney's Master Plan for Mineral King Wonderland



Walt Disney's hope for Mineral King

"We believe that Mineral King should be much more than the best place to spend a vacation or holiday. We want it to be an *experience* with the outdoors for those who love nature — or who want to learn to love it.

"It is our plan to make Mineral King a year-round outdoor recreational adventure for everyone ... a challenge to the accomplished skier and a good place to put skis on for the first time ... the ideal spot for an old-fashioned family outing ... home base for wild-life students, hikers, fishermen and campers ... the perfect retreat for those who just want to get away for a breath of fresh, invigorating mountain air.

"Stated simply, we are planning Mineral King with you in mind. Whatever your interests, athletic abilities or income level, we want Mineral King to be your choice for outdoor, year-round recreational activities.

"Our plan for the area is being guided by one other very important consideration: Mineral King's great natural beauty must be preserved at all costs.

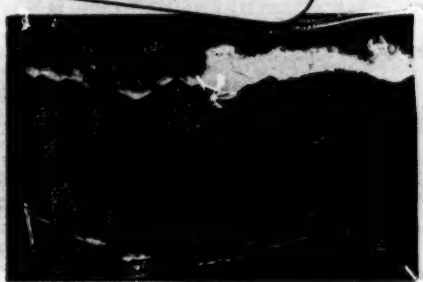
"When I first saw Mineral King, I thought it was one of the most beautiful places in the world, and we will keep it that way. With its development, we will prove once again that man and nature can work together to the benefit of both."



A promise from Walt Disney

"When we go into a new project, we believe in it all the way. That's the way we feel about Mineral King. We have every faith that our plans will provide recreational opportunities for everyone.

"All of us promise that our efforts now and in the future will be dedicated to making Mineral King grow to meet the ever-increasing public need. I guess you might say that it won't ever be finished."



State of California — Transportation Agency

Memorandum

To : Mr. Gordon C. Luce, Chairman and Members of the California Highway Commission

Date: September 8, 1967

File: 06-Tul-276 0.0/20.4

From : Department of Public Works—Division of Highways

Subject: Resolution of Intention

Submitted for your consideration is a map showing the recommended location of State Highway Route 276 in Tulare County between 0.6 mile east of Salt Creek near Route 198 and Mineral King.

This recommended location is to be developed as an access-controlled facility. It is approximately 20.4 miles in length and is estimated to cost $22,400,000, including $22,000,000 for construction and $400,000 for rights of way. These estimates are based on construction of a basic two-lane 28-foot roadbed with safety lanes for passing where feasible.

ALTERNATE ROUTES

As discussed in the attached Report of Route Studies, a single studied location in the canyon of the east fork of the Kaweah River appeared to offer the most feasible plan for development of an all-weather highway to Mineral King. The highway will provide access to the proposed $35 million recreational complex at Mineral King being planned by Walt Disney Productions under a permit from the U. S. Forest Service.

The project is located primarily through U. S. Government lands. The central portion crosses a six-mile width of Sequoia National Park. To the east of Sequoia National Park, the highway is almost entirely within federally owned National Forest lands. To the west, federal lands under the jurisdiction of the Bureau of Land Management are primarily involved with privately owned property representing about 25 to 30 percent of the total.

SUMMARY OF REACTIONS

Endorsements for or opposition to the project have been received from a very wide range of public agencies and officials, civic and group organizations, and individuals.

Exhibit: E

Governmental agencies supporting the project include the Tulare County Board of Supervisors, the Porterville City Council, and the U.S. Forest Service.

The project has been endorsed by a number of legislators including U. S. Senators Thomas Kuchel and George Murphy, Congressman Robert Mathias, State Senators Hugh Burns and Howard Way, and Assemblyman Gordon Duffy. Mayor Sam Yorty of Los Angeles has also expressed support of the project.

Organizations supporting the project include the State Chamber of Commerce, the Porterville Chamber of Commerce, the Tulare County Highway Committee, the Far West Ski Association, the California Wildlife Federation, the Advisory Committee to the U. S. Forestry Service, the Sierra Land Use Committee, and Walt Disney Productions.

Those opposing the project include Assemblyman Alan Sieroty, the Kern-Kaweah Chapter of the Sierra Club, and the Mineral King District Association.

At the public hearing held on August 10, 1967, 12 individuals spoke or wrote letters for the record opposing construction of the route, and four went on record favoring the project.

Throughout the entire route study stage since initiation in April 1966, the project has generated a high degree of public interest. The Division, the Department, and the Commission have received many letters from individuals and organizations expressing both support and opposition to the Route 276 project.

Just prior to the public hearing in a letter dated August 2, 1967, Mr. Robert B. Moore, Acting Regional Director of the National Park Service, advised that the Secretary of the Interior has not decided to permit access to the Mineral King area across Sequoia National Park lands. He further stated that the National Park Service would be without authority to participate in a public hearing.

On the day of the August 10, 1967, public hearing, a telegram was received from Assistant Secretary of the Interior Stanley A. Cain advising that no easement exists for the planned new highway through Sequoia National Park to service development at Mineral King and the decision on this question has not been made.

RECOMMENDATION

On the basis of the engineering studies, the conferences with local, State and federal authorities, and the results of the public hearing held in connection with the project, the single studied location as shown on the attached map is recommended for route adoption consideration.

Although the Department of the Interior has not given approval to cross Sequoia National Park lands, the recommended corridor across park lands is considered the only feasible location for development of the route as authorized by the Legislature. With adoption of the route, the State will have a firm proposal to present to the Department of the Interior for consideration.

The proposed alignment is compatible with the terrain with every attempt being made to avoid disruption of the area. It also meets the requirements of the U.S. Forest Service for development of the Mineral King recreational complex.

The project has received wide public support, including that of Governor Ronald Reagan, former Governor Edmund G. Brown, U. S. Senators Thomas Kuchel and George Murphy, Secretary of Agriculture Orville Freeman, and the Tulare County Board of Supervisors. Although opposed by conservationists, the highway will permit access to and recreational development of the Mineral King area, benefiting both the economy of Tulare County and the recreational demands of California's ever-expanding population.

It is therefore recommended that the Commission take appropriate action to authorize the State Highway Engineer to proceed in accordance with current procedural policy to notify the Tulare County Board of Supervisors and the local press of the Commission's intention to consider the adoption of a route and its designation as a freeway.

J. A. LEGARRA
State Highway Engineer

Attach.

REPORT

OF

ROUTE STUDIES

RELATIVE TO

THE FREEWAY LOCATION

OF

ROUTE 276

IN TULARE COUNTY

BETWEEN

0.6 MILE EAST OF SALT CREEK

NEAR ROUTE 198

AND

MINERAL KING

06-TUL-276 0.0/20.4

SEPTEMBER 1967

PROPOSAL

It is proposed to establish the location as an access-controlled facility of the portion of State Highway Route 276 in Tulare County between 0.6 mile east of Salt Creek near Route 198 and Mineral King, a distance of approximately 20.4 miles.

The route is to be developed as an all-weather highway to provide access to the proposed $35 million recreational complex at Mineral King being planned by Walt Disney Productions under permit from the U. S. Forest Service.

BACKGROUND INFORMATION

Route 276 was added to the State Highway System by action of the 1965 Legislature.

At the April 21, 1966, Commission meeting, the Division presented a brief status report covering planning considerations involved in development of the route. This report advised that the Governor's office had on April 4, 1966, submitted an application for a Federal Economic Development Administration grant for the planning and design phases of route development. (The application was subsequently revised to a request for a construction grant.)

Following discussion of the project at the April 21, 1966, meeting, the Commission adopted a motion directing the Division to immediately initiate routing studies so that the location, type of facility, and estimated costs for development of Route 276 could be determined at an early date. These studies are now completed and a public hearing has been held. Since development of the route will require traversing portions of Sequoia National Park and Sequoia National Forest, the studies have been closely coordinated with park and forest officials.

In the 1966 First Extraordinary Session, Senate Concurrent Resolution No. 19 was passed on May 16, 1966, which requested the Highway Commission and the Division of Highways to undertake all steps necessary to bring about prompt selection, adoption, and determination of the location of Route 276.

On December 14, 1966, the California Transportation Agency accepted a $3 million federal construction grant from the Economic Development Administration to help defray the costs of the Mineral King highway project. The Economic Development Administration grant required the entire project to be under contract within 24 months and also required that

the Federal Government must be furnished evidence by March 31, 1967, that the State has available sufficient funds to complete the project. Subsequently, the Economic Development Administration has agreed to amendments to the Offer of Grant providing for the project to be constructed in units and to be financed over a longer period of time.

At its meeting on April 20, 1967, the Highway Commission passed a resolution allocating $800,000 for expenditures for acquisition of rights of way on Route 276 during the 1967-68 fiscal year. In this resolution, the Commission also declared its intent to budget, as necessary, all funds needed to permit award of all construction contracts over a subsequent period of four years for the Mineral King project in accordance with the Economic Development Administration Offer of Grant as revised.

Also at its April 20, 1967, meeting, the Highway Commission adopted a separate motion requesting the Legislature to give consideration to a toll road as a means of helping to finance the project.

On June 15, 1967, House Resolution No. 250 by Assemblyman Duffy was adopted by the Assembly requiring the Department of Public Works to report its findings and recommendations relative to the feasibility of various methods of defraying the cost of the Route 276 highway to Mineral King to the Assembly on or before the fifth legislative day of the 1968 Regular Session. As part of the study, the Department is to ascertain if toll financing would conflict with the requirements of the Economic Development Act.

Because of the complex financial considerations involved in possible use charges involving the selling of revenue bonds, it was felt that an outside consultant should be retained to assist in the preparation of these aspects. The Division is negotiating with the firm of Coverdale and Colpitts to undertake these studies, which are expected to require 90 to 120 days to accomplish.

PRINCIPAL CITIES OR COMMUNITIES

The subject project begins on Route 198 about 32 miles east of Visalia near the unincorporated community of Three Rivers, which has a population of approximately 1,000. The route terminates at Mineral King, where there are a number of summer homes, a pack station, a store, and a ranger station.

ROUTE PLANNING

The legislative description of Route 276 is from "Route 198 near Three Rivers to Mineral King."

Route 276 is not included in either the California Freeway and Expressway System or the State Scenic Highway System. The route is not presently included in any Federal-aid system of highways.

The beginning of the project at this time is about 0.6 mile east of Route 198 so as not to prejudice the selection of a routing for future relocation of Route 198 in the Three Rivers area for which studies are now under way. The connection between Routes 276 and 198 will be included in the Route 198 study, which is expected to be completed in early 1968.

EXISTING COUNTY ROAD

Tulare County maintains a very narrow and substandard road between Three Rivers and Mineral King. Its length is approximately 25 miles, consisting of extremely substandard alignment and grades. There are a number of switchbacks with radii of less than 50 feet. Most of the surface is oiled dirt with several short sections consisting of only a graded roadbed.

The road traverses from Elevation 1,160 at the junction of Route 198 to an elevation of 7,830 at Mineral King. Heavy snow generally exists during the winter southeast of Lookout Point (about 10 miles east of Three Rivers), and presently the road is closed beyond this point during the winter months.

The local name of the existing county road is "Mineral King Road." It was reviewed in the field and found not to qualify for acceptance for State maintenance.

TRAFFIC

The Tulare County Road Commissioner's office estimates current average daily traffic on the county road to be 95 vehicles. Counts made over the 1966 Memorial Day weekend indicated a total of 1,483 vehicles between midnight Thursday and midnight Monday. The highest single day was Sunday, which registered 483 vehicles. The highest hourly volume during the weekend was 107 vehicles, with several hours in the range of 50 vehicles.

On the basis of the recreational development proposed by the Disney firm, it is estimated that by 1978, upon completion of the first phase of development, the average daily traffic volume would be 4,550 vehicles. During the peak months (summer) the average daily traffic would increase to 9,850 vehicles. By 1990, the average daily traffic is estimated to increase to 6,900 vehicles.

TYPICAL SECTION

Cost estimates are based on development of a basic two-lane 28-foot roadbed section with safety lanes for passing at frequent intervals.

Since the early stages of planning of the route, it has been evident that a wide variation of driving speeds will prevail. This, combined with the limited opportunities for passing maneuvers on the 28-foot roadbed and the long sustained grades, creates an urgent need for safety lanes to allow passing at intervals along the route. These lanes will also be used for installing and removing tire chains, depending upon the snow line.

Experience has shown that these safety lanes should be approximately one-half mile in length. We also believe they should be spaced so that vehicles would have to tolerate no more than five minutes in a queue without a passing opportunity. The exact positioning of these lanes would be determined during further study during detail design of the project.

The proposed 28-foot, two-lane road, under the planned conditions of grade and sight distance restrictions, will have a capacity of at least 1,200 vehicles per hour in one direction. This is considered adequate to safely handle the projected traffic to be generated by the Disney-Mineral King recreational development.

ALTERNATE ROUTES

Studies relative to this project were initiated following the California Highway Commission's request of April 21, 1966, for immediate commencement of studies to determine the routing and standards for an all-season highway.

Several corridors were initially considered but based on reconnaissance studies, it was concluded that feasible development of an all-weather highway to Mineral King is possible only in the corridor of the east fork of the Kaweah River. The existing county road to Mineral King generally parallels this water course; however, very little of the existing roadbed can be incorporated into the proposed all-weather highway.

Within this corridor, two alignments for the westerly portion of the project were studied in detail. Both were based on a minimum curve radius of 850 feet, but one alignment utilized a maximum grade of 6 percent while the other used a maximum grade of 8 percent below the 5,000-foot elevation and 6 percent above the 5,000-foot elevation. This latter alignment is 2.3 miles shorter, and its construction cost is estimated to be $3.5 million lower.

After considering the economic and engineering factors and with the concurrence of other governmental agencies involved, the alignment utilizing the eight percent maximum grade below 5,000 feet was presented at the public hearing as a single proposal representing the most feasible plan of development. The proposed routing is shown on the attached map, Exhibit A. The horizontal alignment in combination with the grades proposed and traffic volumes anticipated, should provide safe operating speeds in the range of 35 to 50 miles per hour.

The project is 20.4 miles in length and is estimated to cost $22,400,000, including $22,000,000 for construction and $400,000 for rights of way. The project terminates at the location of the proposed parking area to serve the Disney recreational development. This parking area is just outside the Mineral King basin in an area called Faculty Flat. The Disney plan is to provide some kind of mass transportation between the parking area and the Mineral King recreational facilities.

The route is located primarily through U. S. Government lands. The central portion crosses a six-mile width of Sequoia National Park. To the east of the national park, the project is almost entirely within federally owned National Forest lands. To the west, federal lands under the jurisdiction of the Bureau of Land Management are primarily involved with privately owned property representing about 25 to 30 percent of the total.

In order to insure that the planned capacity of the roadway may be maintained and to assist in corridor control to preserve scenic aspects, it is proposed to acquire access rights through private properties. To accomplish this, it will be necessary for the Highway Commission to adopt the route as a freeway.

During the course of our studies, considerable attention was given to the problem of preservation of Giant Sequoia trees. By field surveys, we have located and determined the size of every sequoia tree in the general vicinity of the projected line. In addition, the Division has secured the services of Dr. Richard Hartesveldt, a recognized authority on ecology, particularly pertaining to sequoia groves. Dr. Hartesveldt studied in the field the relationship of the projected line to the sequoias.

It is the Division's intention to heed Dr. Hartesveldt's warnings involving encroachment within the root areas of the sequoia specimens and the avoidance of erosive concentration of runoff in the natural drainages. Five structures are proposed specifically to reduce impact upon the groves. To our present knowledge, no significant sequoia need be destroyed to allow passage of the projected route.

Another matter relating to ecology which will receive special attention will be provision of safe crossing for wildlife, particularly deer. Special studies of this problem are now under way for a similar highway in Northern California. We are hopeful that methods can be developed to encourage use by deer of safe crossing points to minimize hazard to both animals and the traveling public.

COORDINATED TRANSPORTATION PLANNING

A. Master Plans

The current Area General Plan for Tulare County was adopted prior to the issuance of the Mineral King development prospectus by the Forest Service and contains no reference to a new or high standard route to Mineral King.

B. City Street and County Road Traffic

The proposed route crosses the existing county road at a number of locations. Where the county road serves property or recreation facilities, connections may be provided. Much of the existing road probably can be abandoned following completion of the new route.

C. Total Projected Regional Transportation Requirements

EOA (illegible)

This project is a major element in the development of the Mineral King recreational complex. Because of the impact of the Mineral King development, this route and the related future Route 198 freeway will be the backbone of the transportation network in eastern Tulare County.

COMMUNITY FACILITIES AND RESOURCES

A. Schools

No schools exist within the limits of the proposed route. The area is sparsely populated at present with very few residents.

B. Public Recreational Resources

As previously mentioned, the project will provide access to the proposed recreational complex planned for development at Mineral King by Walt Disney Productions under permit from the U. S. Forest Service. The route also crosses a six-mile width of Sequoia National Park, thus affording greater public access

to the southern part of the park which contains the Atwell and East Fork Groves of Giant Sequoia redwoods. The Mineral King and Sequoia National Park aspects are discussed separately below.

1. Mineral King Recreational Development

In February 1965, the U. S. Forest Service issued a "Prospectus for a Proposed Recreational Development at Mineral King in Sequoia National Forest." The purpose of this prospectus was to solicit proposals from private investors for development of an extensive winter and summer recreational complex at Mineral King.

In January 1966, the Forest Service awarded a preliminary three-year permit to Walt Disney Productions to undertake planning for the recreational development of the Mineral King area. Under the terms of the permit, improvement of the 25-mile access road from Route 198 near Hammond to such a standard that winter visitors can drive their own cars to Mineral King must also be programmed during the same period.

A 30-year term permit will follow the preliminary permit when (1) recreational development programs and plans submitted are approved by the Forest Service, (2) the first contract is let for a significant portion of the road, and (3) funds are programmed for completion of the road improvement project within five years. If any one of these requirements is not met, the preliminary permit will expire three years from the date of issue, and no term permit will be granted by the Forest Service.

The Walt Disney proposal envisions an investment of about $35 million by 1976 to develop Mineral King facilities in accordance with its master plan. This plan anticipates two million visitors annually with accommodations for 3,600 overnight visitors in permanent facilities and 2,000 more in seasonal facilities. Plans include provision for as many as 20 ski lifts to at least four major bowls.

2. Sequoia National Park

The central 9.2 miles of the proposed routing is within Sequoia National Park. The location studies through the park were closely coordinated with park officials through correspondence and numerous meetings and conferences.

It had been assumed that the Forest Service invitation for the Mineral King recreational development proposals were made with the understanding that development of an improved access road across the park was satisfactory to the National Park Service. In his letter of April 18, 1967, to Chairman of the Highway Commission Gordon C. Luce, Secretary of Agriculture Orville Freeman restated this position and further emphasized that his department was convinced that such a road could be built without jeopardizing the important National Park values involved. A copy of Secretary Freeman's letter is included in the record of the public hearing furnished to the members of the Commission.

Regardless of any prior understanding between the Departments of Agriculture and the Interior, Secretary of the Interior Stewart Udall has not yet agreed to permit construction of Route 276 across Sequoia Park lands. Statements to this effect were contained in (1) a letter dated August 2, 1967, from Mr. Robert B, Moore, Acting Regional Director of the National Park Service, and (2) in a telegram dated August 10, 1967, from Assistant Secretary of the Interior Stanley A. Cain. (Copies of this letter and telegram are included in the record of public hearing.)

Although park officials appear to be in agreement with the proposed route location if access across the park is permitted, Mr. Moore in his August 2 letter objected to the inclusion of safety passing lanes as an indication that the State does not intend to build only a two-lane highway. Mr. Moore stated that the proposal for passing lanes would not be acceptable even if the Secretary of the Interior should approve access.

In response to a request from the Park Service, the Division looked into possible means of highway development to Mineral King which would avoid

a surface routing across the park. In this regard, there appear to be only two possibilities: (1) a north/south routing from State Highway Route 190 via Farewell Gap Summit and (2) a tunnel under the park surface in the corridor of the East Fork of the Kaweah River.

A route from Mineral King via Farewell Gap would continue south along the Little Kern River watershed to a junction with State Route 190 at Quaking Aspen. For traffic originating south of Porterville, this routing results in about five miles of additional travel distance as compared to a routing via the East Fork of the Kaweah River. For traffic originating from north of Route 198 near Visalia, the additional travel distance is about 45 miles.

The Farewell Gap routing between Quaking Aspen and Mineral King is about 28 miles long and is estimated to cost about $78 million, including a 5.3-mile long tunnel. Snow removal costs associated with this routing would be higher than those for a location in the East Fork of the Kaweah River corridor since a longer length of the route is above the snow line.

As an alternative to a surface road across the park in the East Fork corridor, the Division investigated a tunnel beginning at a point near the westerly park boundary and ending at the easterly park boundary near Cabin Cove. This tunnel would run generally easterly on tangent alignment with an uphill grade of about 5.8 percent. It is estimated that such a tunnel would increase the estimated construction cost by approximately $57 million over that of a surface route.

Because of the excessive construction costs and the problems of operation and maintenance on the possible alternatives utilizing long tunnels, it was concluded that the only feasible plan of development for a suitable access road to Mineral King is a surface highway along the general corridor of the East Fork of the Kaweah River. Our investigations indicate there are no practical alternatives worthy of further consideration.

The Park Service also asked if other forms of transportation had been investigated. The Division replied that it had statute authority only in the field of highway development and could not legally expend funds for studies of other forms of transportation to Mineral King. It is understood, however, that both the U. S. Forest Service and the Disney organization have looked into other possible transportation means but have concluded that a modern, all-weather highway is the only practical means of providing access.

Because of concern expressed by the Park Service with regard to impact of the proposed highway upon ecology, the Division, as previously noted, retained the services of Dr. Richard J. Hartesveldt, Associate Professor of Biological Sciences at San Jose State College, to make such a study. Dr. Hartesveldt had been recommended by the National Park Service and has made other ecological studies for the Park Service in the Sequoia and Kings Canyon National Parks redwood groves.

On November 21, 1966, a hearing was held in Fresno by the National Park Service to receive comments with regard to wilderness proposals for Sequoia National Park. The National Park Service proposal for the creation of a Sierra Crest Wilderness and a Hockett Wilderness specifically provides for a corridor between the units about two miles wide along the east fork of the Kaweah River to accommodate improved public access to Mineral King.

C. Historical Areas

There are no known historical sites or areas affected by the proposed routing.

D. Aesthetic Values

Although not presently included in the State Scenic Highway System, the project traverses superb scenery in the canyon of the east fork of the Kaweah River, and the completed highway undoubtedly will provide one of the most scenic drives in the State.

A joint aesthetic review of the project in the field has been made by representatives of the National Park Service, the U. S. Forest Service, and the Division of Highways.

Final design of the project will be closely coordinated with park and forest officials to insure maximum protection and enhancement of scenic values.

E. Property Values and Property Tax Impact

Since all but a small portion of the project passes through federal lands, there will be no significant reduction in tax base of Tulare County by reason of right of way acquisition.

EDA boosts

Because the highway project will make access possible for the Disney Mineral King recreational development, Tulare County should experience a dramatic economic benefit. Based on the economic study prepared by Walt Disney Productions, the proposed Mineral King recreational area is estimated to generate a total of primary and secondary new initial investment of some $57 million within a 10-year period and to result in annual payrolls of at least $13 million thereafter. It will ultimately generate 2,500 new permanent jobs, primarily in the trade and service industries. An immediate result during the construction phase would be the creation of over 500 jobs in construction and supporting services. By 1976, upon completion of the first development phase, it is estimated that Tulare County will be receiving an additional $1,700,000 annually in tax revenues.

F. Impact on Agriculture

The only agricultural lands traversed by the route are occasional marginal grazing lands.

G. Federal, State, and Local Public Facilities

No significant public facilities are involved.

ACTION TAKEN SUBSEQUENT TO INITIATION OF STUDIES

A. Conferences and/or Meetings

Numerous meetings and conferences were held with local staffs of Tulare County, Bureau of Land Management, Sequoia National Park, and Sequoia National Forest to maintain close coordination during the project studies.

During the early period of our studies, the Division constructed a seven-foot long, three-dimensional model of the route corridor. This model has been used on many occasions in connection with meetings, conferences, and displays.

B. Notification of Local Authorities of Provisions of Section 75.5 of the Streets and Highways Code

On May 2, 1966, the Tulare County Board of Supervisors was notified by letter of the provisions of Section 75.5 of the Streets and Highways Code.

No information with respect to this section of the Code was offered for presentation at the public hearing.

C. Notification of State, Federal, and Local Agencies

Letters of notification of the project studies were sent to State, Federal, and local agencies listed on the attached Exhibit B.

The Division of Forestry by letter dated July 12, 1966, noted that its Hammond Forest Fire Station would be affected by the highway routing as proposed In this regard, a change in the proposed routing has been made to eliminate this conflict.

The Regional Water Quality Control Board, Central Valley Region, by letter dated November 7, 1965, requested that they be notified in the event it is necessary to create crossings of the East Fork Kaweah River so pollution prevention measures could be mutually discussed.

By letter dated August 2, 1967, the Department of Fish and Game requested that every effort be made to minimize the loss of wildlife through the use of protective devices such as warning signs, reflectors, fences, and wildlife crossings. They also suggested consideration of establishing access points or parking areas for hunters on public lands along the route up to the park line. They also requested consideration of the protection of water quality in the East Fork Kaweah River.

None of the other replies from the various agencies indicated any conflict in planning.

D. Public Hearing

A well-publicized public hearing was held in the Three Rivers Memorial Building in Three Rivers on August 10, 1967. Approximately 210 people attended the hearing, including Assemblyman Alan Sieroty, Mr. Joseph E. Doctor representing State Senator Howard Way, Mr. Frank S. Reiche representing State Assemblyman Gordon Duffy, members of the Tulare County Board of Supervisors, the Tulare County Planning Director, members of the Tulare County Road Department, the Superintendent of the Sequoia National Park, the Supervisor of the Sequoia National Forest, and representatives of the U. S. Forest Service, California Department of Fish and Game, Southwest Regional Federal Water Pollution Control Administration, Bureau of Land Management, and the Kern County Board of Supervisors.

The District Engineer, District 06, presided at this hearing at which the single studied proposal was presented.

Government agencies supporting the project included the Tulare County Board of Supervisors, Porterville City Council, and the U. S. Forest Service.

The Kern County Board of Supervisors urged that the highway be constructed "without prejudice to the allocation of State highway funds for other highway projects."

The project was endorsed by a number of legislators including Congressman Robert Mathias and State Senators Hugh Burns and Howard Way.

State Assemblyman Alan Sieroty opposed the project.

Organizations supporting the project include the State Chamber of Commerce, the Porterville Chamber of Commerce, the Tulare County Highway Committee, the Advisory Committee to the U. S. Forest Service, the Far West Ski Association, and the California Wildlife Federation.

The Kern-Kaweah Chapter of the Sierra Club opposed the project.

A representative of Walt Disney Productions supported the project and outlined the history of the proposed Mineral King recreational development.

Of those individuals expressing a preference, four opposed the proposed project, and one supported it as presented.

Copies of the transcript of proceedings and the report of public hearing were forwarded for the attention of the members of the Highway Commission under date of September 7, 1967.

E. Correspondence and Statements Received Prior to and Subsequent to the Public Hearing

In April 1967 at the time the Commission was considering whether to proceed with financing, telegrams were received from the following legislators or officials supporting the proposed project: U. S. Senators George Murphy and Thomas Kuchel, Congressman Robert Mathias, State Senator Hugh Burns, Assemblyman Gordon Duffy, and Mayor of Los Angeles Sam Yorty.

In a letter dated August 10, 1967, the Cutter-Orosi Chamber of Commerce felt that the cost of the Mineral King highway should be paid for by those who use it.

Letters for the record of hearing were received from eight individuals opposing the project and three individuals favoring the project.

The Mineral King District Association, in a statement dated August 17, 1967, felt the proposed route should not be built.

Several letters were received subsequent to the hearing from property owners and the Silver City Service Club on behalf of Silver City property owners requesting that the proposed alignment be revised to miss all cabins in the Silver City area if at all feasible from an engineering standpoint.

Copies of all the afore-mentioned correspondence are included in the record of the public hearing.

In addition to those submitted for the hearing record, many letters have been received since the initiation of studies in April 1966 expressing both support of and opposition to development of Route 276.

F. Studies Subsequent to the Public Hearing

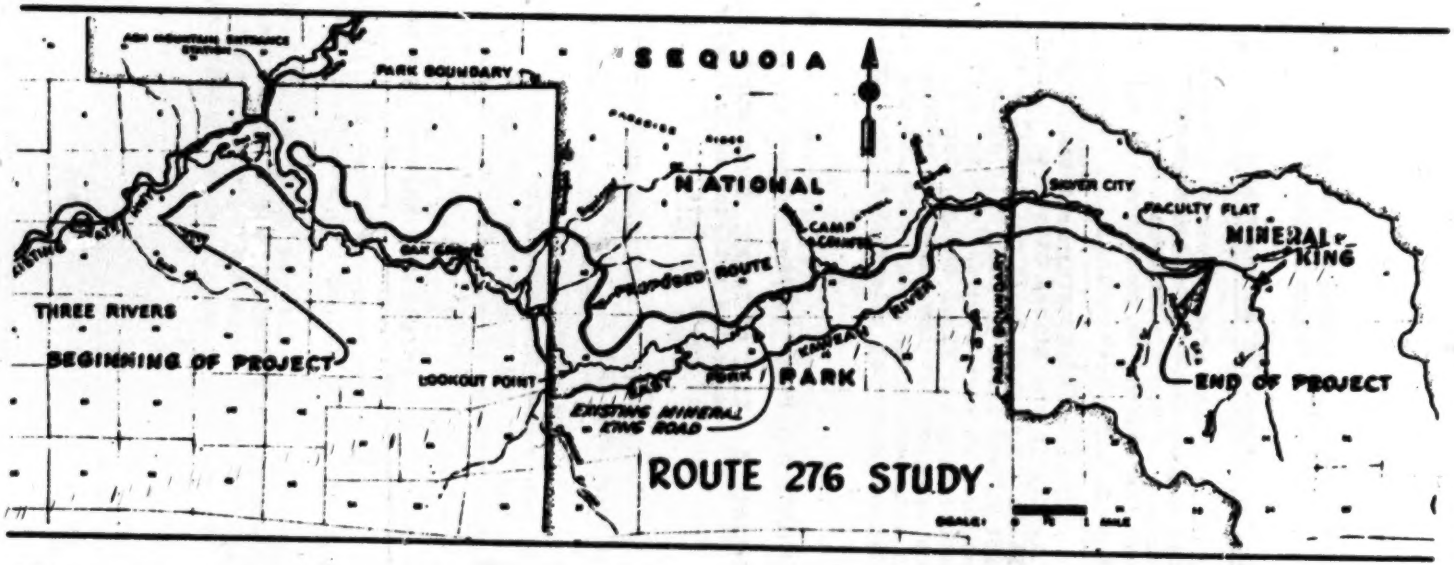
As noted above, private property owners in the vicinity of Silver City (just easterly of the east boundary of Sequoia National Park) have requested that the routing be positioned to miss all cabins if at all feasible.

It appears that the alignment can be shifted slightly in the Silver City area to avoid several cabins. However, it is not possible to miss all cabins, and three or four will probably be required. Further studies in this regard will be made during the final design stage to minimize as much as possible the taking of cabins. Any shift in alignment would be of a relatively minor nature within the normal tolerance of the route adoption.

ATTACHMENTS

Exhibit A - Project Map.

Exhibit B - List of Local, State and Federal Agencies notified of initiation of route studies.



'GTH: 20.4 MILES ← ESTIMATED CONSTRUCTION COST: $22,000,000 ← ESTIMATED RIGHT-OF-WAY COST: $ 400,0

August · 1967

EXHIBIT G

DEPARTMENT of the INTERIOR

news release

[redacted]

For Release April 26, 1969

[redacted]

Secretary of the Interior Walter J. Hickel said today that he has asked the National Park Service to revise its master planning procedures to provide for broader public review and comment.

Hickel noted that the Wilderness Act of 1964 already provides for advance public review and comment on proposals for Wilderness designation.

"This seems to me to be an eminently sensible procedure. While most Master Plans are more complex than wilderness values are involved, I believe that public participation in the planning process should be encouraged for all areas of the National Park System," Hickel said. "Public meetings will afford interested citizens a superior opportunity to make known their views on all proposals affecting a park area. Such meetings will, however, be more informal than present wilderness hearings which require formal notice and recorded transcripts."

A Park area Master Plan, he pointed out, affects all management facets, including location of visitor centers, concessioner accommodations for lodging and eating, administrative structures and facilities, as well as the location and design of roads.

In preparing such plans, the Secretary added, National Park Service specialists trained in several disciplines take into account such factors as ecology; natural, scientific and historic features of the area to be protected; effects upon fish and wildlife, and protection of water resources from pollution.

In light of the proposed new procedures broadening public participation in the Master Plan policy, Hickel said he was revoking a policy statement on construction of major park roads adopted by the previous administration on January 18, 1969, and published in the Federal Register on January 29, 1969.

That policy would only have required public hearings on the location and engineering design of any proposed new major National Park System road.

"Since the location and design of park roads is only one of several important factors in the planning process," Hickel said, "it is not logical to single out the road construction aspect of planning for public discussion. All phases should be subject to comment from the public."

[redacted]

xxxxx

12130-69

EXHIBIT 4

DEPARTMENT OF FISH AND GAME

December 27, 1963

Mr. N. E. Jones
1714 S. Beverly Glen Boulevard
Los Angeles, California 90024

Dear Mr. Jones:

This is in reply to your letter of November 17, 1963 which inquires about flows and water quality of the East Fork of the Kaweah River in the Mineral King area.

You refer to a report for the Three Rivers Soil Conservation District (1963) which quotes this Department as stating "in a normal year the flows of all the forks (of the Kaweah River) are below the desirable minimum discharges". We apparently do not have a copy of this report, but can confirm that the statement attributed to us is true. The waters of the Kaweah River are diverted and re-diverted through a series of hydroelectric power facilities resulting in very low flows on most of the river until the water passes through Powerhouse No. 2 which is the most downstream of the S.C.E. facilities. Below Powerhouse No. 2 the water is allowed to flow in the river channel.

We have initiated studies of the Mineral Company's Kaweah development in connection with the Federal Power Commission relicensing of the project. The current license expires on August 7, 1978. Our studies are aimed at developing recommendations for the improvement of fish and wildlife conditions in the project area. These recommendations will be submitted to the FPC and hopefully will be made terms of the new license which will be issued.

The National Park Service has issued a special use permit to the Mineral Company for the development within Sequoia-Kings Canyon National Park. The permit stipulates that certain releases shall be made below the diversions on the Middle and Marble Forks. Our current study relative to FPC Project No. 176 may show that different flows are desirable, and we will recommend higher flows to the FPC if this appears desirable.

Your second question asks for a description of any reports on the water quality and quantity for fish and wildlife in the East Fork of the Kaweah. We have made no such reports to date nor do we know of any. We have, however, worked with the Mineral Company on treatment techniques for control of algae.

EXHIBIT I

Mr. R. L. Ames -2-

You also asked whether or not there have been studies of the effect of reductions in the water quality and quantity caused by the development of the Mineral King area. We have not yet studied this matter, but expect to do so in the near future.

We understand the Federal Water Pollution Control Administration and the U. S. Geological Survey are currently engaged in sampling streams in the Mineral King area to determine their water quality characteristics prior to any development. We understand a report on this study will be published next month. You should be able to obtain a copy by writing to the Federal Water Pollution Control Administration, 450 Central Avenue, Alameda, [illegible]

The State Water Resources Control Board has set tentative standards for water discharge in the Mineral King area that probably will be adopted shortly.

Your fourth question regards the potential effect of development in the Mineral King Game Refuge on game. This Department has not made specific studies nor prepared reports regarding the effects of this development on wildlife. We can say, however, that in an extensive development such as the Disney proposal, considerable wildlife habit would be lost and wildlife would suffer from human encroachment. In addition, the deer hunting that the U. S. Forest Service now permits in its game refuge would undoubtedly have to be curtailed because of the influx of people to the Disney development.

I hope we have provided you with the information you desire.

If you require additional detailed information regarding our interests in the Mineral King area, I suggest you contact Mr. Chet Hart, our Regional Manager for Region 4. His address is:

Mr. Chet Hart
Department of Fish and Game
Region 4
1234 East Shaw Avenue
Fresno, California 93710

Sincerely,

J. C. Fraser

J. C. Fraser, Chief
Water Projects Branch

Area Permit - (Supplemental to Term Permit)

SAMPLE

SPECIAL USE PERMIT

REGION	STATE	FOREST	RANGER DISTRICT
5	California	Sequoia	Tule River

Permission is hereby granted to (Successful applicant)

of _____;

hereinafter called the permittee, to use subject to the conditions set out below, the following described lands or improvements:

National Forest land in portions of sections 18, 22, 27, 28, and 34, Mount Diablo Meridian, Sequoia National Forest, shown on the map attached to the Term Permit of (date) issued to the above permittee, as needed for the users of the facilities and improvements specified in Clause 22 of the term permit.

This permit covers _____ acres and/or _____ miles and is issued for the purpose of:

Developing and maintaining ski slopes, trails, parking areas, refuse and sewage disposal areas, roads, etc. in conjunction with the facilities and improvements specified in Clause 22 of the foregoing Term Permit.

The exercise of any of the privileges granted hereby constitutes acceptance of all the conditions of this permit.

1. In consideration for this use, the permittee shall pay to the Forest Service, U.S. Department of Agriculture, the sum of _____ Dollars ($_____) for the period from _____ 19____, to _____, 19____, and thereafter annually on (see Clause 19 of Term Special Use Permit) _____, _____ Dollars ($_____):

EXHIBIT J

2. Construction or occupancy and use under this permit shall begin within _____ months, and construction, if any, shall be completed within _____ months, from the date of the permit. This use shall be actually exercised at least _____ days each year, unless otherwise authorized in writing.

3. Development plans; layout plans; construction, reconstruction, or alteration of improvements; or cutting of layout or construction plans for this area must be approved in advance and in writing by the forest supervisor. Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved, and has marked or otherwise designated that which may be removed or destroyed. Timber cut or destroyed will be paid for by the permittee as follows: Merchantable timber at appraised value; young-growth timber below merchantable size at current damage appraisal value: *provided*, that the Forest Service reserves the right to dispose of the merchantable timber to others than the permittee at no stumpage cost to the permittee. Trees, shrubs, and other plants may be planted in such manner and in such places about the premises as may be approved by the forest officer in charge.

4. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge.

5. This permit is subject to all valid claims.

6. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

7. The permittee shall take all reasonable precautions to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the forest officer in charge or his authorized agent.

8. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the national forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.

9. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

10. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise herefrom unless it is made with a corporation for its general benefit.

11. Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and restoration of the site.

12. This permit is not transferable. If the permittee through voluntary sale or transfer, or through enforcement of contract, foreclosure, tax sale, or other valid legal proceeding shall cease to be the owner of the physical improvements other than those owned by the United States situated on the land described in this permit and is unable to furnish adequate proof of ability to redeem or otherwise reestablish title to said improvements, this permit shall be subject to cancellation. But if the person to whom title to said improvements shall have been transferred in either manner above provided is qualified as a permittee and is willing that his future occupancy of the premises shall be subject to such new conditions and stipulations as existing or prospective circumstances may warrant, his continued occupancy of the premises may be authorized by permit to him if, in the opinion of the issuing officer or his successor, issuance of a permit is desirable and in the public interest.

13. In case of change of address, the permittee shall immediately notify the forest supervisor.

14. The temporary use and occupancy of the premises and improvements herein described may be sublet by the permittee to third parties only with the prior written approval of the forest supervisor but the permittee shall continue to be responsible for compliance with all conditions of this permit by persons to whom such premises may be sublet.

15. This permit may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest Service.

16. In the event of any conflict between any of the preceding printed clauses or any provision thereof and any of the following clauses or any provisions thereof, the preceding printed clauses will control.

17. This permit is accepted subject to the conditions set forth above and to conditions 18 to 41 of the additional terms and conditions part of this ~~permit~~ foregoing form Special Use Permit.

This permit is accepted subject to the above conditions

Date_____ Permittee_____

DATE	SIGNATURE OF ISSUING OFFICER	TITLE

7-0 698-320

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE
SEQUOIA NATIONAL FOREST
PORTERVILLE, CALIFORNIA 93257

IN REPLY REFER TO
2720(2300)

May 15, 1968

Pam - copy of letter to F. Eisler

Mr. Jack Hope, Associate Editor
Natural History
Journal of the American Museum
of Natural History
Central Park West at 79th Street
New York, New York 10024

Dear Mr. Hope:

The Mineral King questions posed in your April 17, 1968 letter to Assistant Regional Forester W.S. Davis are good ones; and we appreciate your consideration of the Forest Service position before writing an article.

I will answer your questions in the order given.

1. Walt Disney Productions (WDP) has spent over $800 thousand dollars in research and planning towards the development of Mineral King as a family type, year-round, alpine recreation complex. The master planning is progressing well now, and hopefully will be ready for Forest Service review by December 1969.

   WDP has a preliminary planning permit which would terminate in September 1969. By that date the Disney corporation must: (1) have a master plan satisfactory to the Forest Service, (2) a contract must be let to construct a portion of the all-weather access highway, and (3) funds must be programmed to complete the highway three years after the first construction contract. The last item has been met. We believe the other two requirements will be completed within the time limits. 3

   The major problem with full scale development of Mineral King has always been access. The access road will be expensive, even with the modest standards proposed - 28 feet wide with occasional passing lanes, 6% to 8% grades, and minimum 850 foot radius curves. The peak load capacity would be about 1,200 cars per hour. The road may eventually be a limiting factor in the use of Mineral King; and this capacity could very well approach the safe ecological summer capacity of the site.

EXHIBIT K

The California Division of Highways has a firm and approved highway location. Most of the planning and design surveying is completed. After many months delay, Interior Secretary Udall agreed to grant the State a road right-of-way across the Sequoia National Park in December 1967. As of this date though, the Department of Interior has not decided on their standards for the Mineral King road across the Park. Road construction is planned to start around the middle of 1969.

2. First you must be made well aware Mineral King is not wilderness and has not been such since the early mining days of the 1870's. There is a low standard county access road which annually is more heavily used - about 15% increase yearly in the past few years. There are about 720 acres of private land in six separate parcels in the Mineral King enclave on which many cabins and two separate small resorts have been built. There are 60 summer homes and a Forest Service station on National Forest land. There is a commercial pack and day-ride station and three developed public campgrounds. To call Mineral King de facto wilderness is misuse of the term "wilderness".

As the reputation of Mineral King draws more and more people, the impact on the limited facilities is starting to show. We feel confident, under careful planning and supervision, that a well designed and conceived alpine recreation development can better direct the impact on Mineral King's natural resources than the presently unrestricted use enjoyed for the past 50 years.

The access road will end at a parking lot near the 7300 foot elevation which is well above the San Joaquin Valley inversion layer holding smog below. Because cars will not be moving around in Mineral King, because of up and down canyon daily breezes, and because Mineral King is above the inversion layer, qualified meteorologists claim there will be no smog.

Dr. Hartesveldt, the leading expert on the Sequoia gigantea, has studied the proposed road location and design and sees no threat to any redwoods. The State will bridge the few drainages where redwoods occur near the highway.

The access road is two-lane with occasional passing lanes. The greatest mileage is below treeline, in the chaparral zone. The California Division of Highways has shown real enthusiasm in making this a scenic highway. Their cut and fill landscaping are impressive. Government landscape specialists are also working with the State to insure the most attractive end result. Clearing, soil disturbance and erosion will be kept to the absolute minimum.

3. We have "statistical indications of the need for Mineral King". The annual increase in summer use on California National Forests has been running about 10% and the winter increase close to 15%. The funding we receive allows around a 5% increase in summer recreation facilities, and as you know, the federal government does not build or operate winter sports facilities which are complex and expensive. Mineral King will be the largest developed out-door recreation complex available to the burgeoning Los Angeles population center. Mineral King will reduce the ski pressure on overcrowded Mammoth Mountain and should reduce the ski pressures to open the San Gorgonio Wilderness Area.

Out-door recreation and population projections clearly show an increasing demand for recreation facilities. Governmental agencies alone have not been able to meet the demand. Mineral King is a fine example of coordination between private enterprise and government, working together, to meet a public demand on public lands. We are fortunate in having such a reputable and capable permittee with whom to work on the multitude of details to make Mineral King the outstanding alpine recreation area in the United States, if not the world.

It is a bit difficult to say what "the prime benefits to the State and to the Nation" will be of a Mineral King. As indicated, Mineral King was again proposed for development because of the rising public demand for additional winter sports facilities. (There aren't many suitable sites remaining in California.) A truly alpine setting, readily accessible to the population centers of California, is presently nonexistent. Mineral King will provide millions of people an opportunity to see the alpine environment and if they wish, to gaze upon wilderness. Mineral King will provide a unique opportunity to contact, and hopefully, to educate many people in out-door manners and conservation concepts. And the Disney organization, with their expertise, stands ready to help.

Let me point out that California national forests presently have well over 1,000,000 acres of mountainland dedicated to wilderness. Future planned additions from the National Forests and Parks will put the total preserved acreage in California over two million acres. A very small percent of the population actually get deeply into wilderness, therefore, we feel most of the public should be allowed reasonable and conventional access to their lands for the broader spectrum of out-door recreation pursuits.

Mineral King is very unique in its winter sports potential, yet covers only about fifteen thousand acres. In an effort to best meet the needs of all people, we believe it represents a very logical balance of land use.

4. Local feelings to the Mineral King project are favorable. The large number of skiers are eager for Mineral King to open. Many people wish to see and enjoy Mineral King but won't drive the present difficult road. Of course the local county is anxious for Mineral King to start, because the principal industry now is agriculture, seasonal and economically uncertain.

✓

Opposition has come mainly from the preservation groups and summer home owners. Preservationists have often been misled through distorted comments and misstatements about Mineral King in their respective publications.

We have reproduced only a few articles on Mineral King for your review since the volume to choose from is large.

We can assure you the Forest Service will continue to put its full resource management experience behind the Mineral King development.

Sincerely yours,

L. N. Whitfield

L.N. WHITFIELD
Forest Supervisor

Enclosures

PLEASE RETURN
TO
PLANNING DEPT.

06-ZuC-276

ATWELL GROVE

REDWOOD CREEK GROVE

Study by:

R. J. HARTESVELDT

EXHIBIT L

December 19, 1966

Memorandum to: Mr. E.E. Deffebach, District Engineer, District VI, California Division of Highways, Fresno, California.

From: Dr. Richard J. Hartesveldt, Associate Professor of Biological Sciences, San Jose State College, San Jose, California.

Subject: Study of the Possible Changes in the Ecology of Sequoia Groves in Sequoia National Park to be Crossed by the New Mineral King Highway.

Submitted in fulfillment of Contract No. 6177-H.

INTRODUCTION

Under the provisions of the act of the federal Congress of September 25, 1890 which created Sequoia National Park, and under the provisions of the act of August 25, 1916 which created the National Park Service, this Service is thus required to maintain

"- - - the scenery, natural and historical objects in such a manner as will leave them unimpaired for the enjoyment of future generations."

Thus, the primary goal of the National Park Service explicitly qualifies the manner in which roads and structures may be built on national park lands. Primary values within the parks are given top protective priority in any plan. Damages to secondary values must be held to a minimum.

One of the primary values for which Sequoia National Park was established is the groves of giant sequoias (Sequoia gigantea) found there. All construction or land management within this park is subordinate to the protection of these trees which might result from such construction or management. It is known from previous studies that man's activities in sequoia groves influence the ecology of this species. The object of this study, then, was to determine what changes might occur from the construction of a new high-speed highway across the Atwell and Redwood Creek Groves and to elaborate on those changes which have a potential of being detrimental to sequoias in the vicinity of and downstream from the proposed road alignment.

A brief resume of the attributes of the giant sequoia and of the physical and biological nature of the two groves to be crossed will make possible the fullest comprehension of the problems which may be incurred and shed light upon the possible solutions to these problems.

The Atwell and Redwood Creek Groves are located on the generally south-facing slope of the East Fork of the Kaweah River at elevations varying from about 5,200 feet up to 8,800 feet on Paradise Ridge. The land is commonly steep and rocky although parts of it have gentle gradients and soil materials have formed or collected into deep accumulations. The Redwood Creek Grove is estimated to cover about 120 acres, most of which is in close proximity to the creek itself. The Atwell Grove is about 1,500 acres in size and is virtually all under the jurisdiction of the National Park Service. It is a superb grove of sequoias and bears the distinction of having in it a sequoia tree at a higher elevation than any other known - 8,800 feet on Paradise Ridge.

Most of the sequoias of the Atwell Grove are located above the proposed roadway, but many of them are along the drainageways below the main body of it where they have seeded because of the water transportation of both seeds and cones. These extensions will be shown later on maps. It is across these finger-like extensions that the new roadway is scheduled to be built.

While the age-classes of the sequoias are mixed in these two groves, reproduction has been scant since the time of logging in the late 1800's. None is to be found within the right-of-way of the proposed road. In 1963, Aley stated, "Reproduction in this grove (Atwell) is sparse and scattered, and is confined to favorable local sites such as stream banks, up-turned stumps, and seeps. Some areas in the grove have no reproduction whatsoever." 1/

It is not entirely clear what Aley meant by "reproduction." There are young trees in the area covered for this study, but they are mostly more than 30 years old, judging from their diameters and heights. The few small ones encountered appear suppressed by competition for light and soil moisture and very likely are of the same general age class. These trees are growing so slowly that it could be said that they are just barely surviving. Few in number, these suppressed trees will probably succumb within the next 25 to 30 years. Some will die earlier.

In all, there are 105 sequoia trees of all age classes below the proposed roadway centerline, of which 49 could be affected in some manner by the construction of the road.

1/ Aley, T.J. Final Report on the Tree Mapping and Regeneration Studies in the Giant Sequoia Groves of Kings Canyon and Sequoia National Parks. Typed (spirit reproduction) contract report for the Western Region, U.S. National Park Service, San Francisco, California. 63 pp., maps, November, 1963.

(*Fig. 1.* Summary of Sequoia Trees Below Proposed Mineral King Highway, Sequoia National Park, California. *Omitted*)

Possible Influences to Sequoias Ecology Because of Road Building

The sequoia, while not an indelicate tree, has at least two vulnerable points which must be given serious consideration for any and all road construction. First, mature sequoias are excessively large and heavy. Their root systems, by comparison, are shallow and seemingly inadequate for the support of such great weight. This species is noted for its remarkable balance where both the tree and its soil environment are left undisturbed. Muir (1877) found sequoias growing on slopes up to 50 per cent and the author of this report knows of a 100 per cent slope in the Redwood Mountain Grove of Kings Canyon National Park which supports sequoia trees at least 5 or 6 feet in diameter. This balance, however remarkable, is easily upset where soils are set in motion through erosion or solifluction, where soils are rendered overly wet by the accumulation of water in excess of the natural average over the years, and by damage to the trunk of the tree, such as by fire. While the latter situation is not apt to be inflicted by road building, it must be pointed out that a high percentage of large sequoias have borne such scars for many years now and are thus already weakened. Studies by Hartesveldt (1965) showed that approximately 95 percent of all sequoias which had toppled to their death on sloping terrains fell in the direction of a large fire scar, this indicating the weakness of scarred trees.

Toppling over is the number one cause of sequoia death. Of those that topple, nearly all of them were located either on steep slopes or along a water course where the soil support was weakened by the presence of water. More than 80 percent of all sequoia trees encountered in this study are growing on slopes of moderate to great steepness, in close proximity to water courses, or both.

The nature of the substrate also plays a role in a sequoia's stability. This species has roots which usually do not penetrate the soil deeper than four feet. Most of the roots are within the upper two and one-half feet of the soil. In rocky areas, soil accumulations may well be two feet deep or less. Yet sequoias survive there to an old age literally perched on top of a solid rock base. As might be suspicioned, they also topple there quite readily because of the insecure anchoring of their massive weight. I believe this to be the most delicate of all situations for large sequoia trees.

For those larger specimens growing in deeper soils, stability may be weakened by increased soil moisture so that the tree topples over in a wind

storm or is overbalanced by snow piling heavily on its crown during winter or early spring. This was the reason assigned to the fall of the Iron Tree in the winter of 1954 in the Mariposa Grove (Hartesveldt, 1963). The water accumulations here was due to a faulty valve at the pressure break in the local water system. In the Atwell and Redwood Creek Groves, depending upon the nature of the drainage system, serious attention should be given to the possible increase in water accumulations because of runoff from the impervious surfaces of the road which concentrate in these natural drainageways. Even temporary soil saturation could result in the falling of a sequoia. This aspect will be amplified later in the section of the report dealing with the individual drainageways under concern.

One other consideration that will probably only be a minor problem in these groves concerns a more-or-less permanent increase in soil moisture. If the water table is raised, sequoia roots within the zone of saturation lack for oxygen, become non-functional and die. Several trees so affected in the Mariposa Grove situation (previous paragraph) showed signs of decreased crown vigor which was clearly reflected in the reduced annual increment to the trunk. Two of the trees died as a result of this long-term increased soil water. Inasmuch as the anticipated increase in drainage water will be from snow melt which comes largely before the growing season, there will likely be little or no problem of this kind.

Root Pruning and Fill over Roots

If the roadway is constructed essentially as plotted on the topographic map prepared by the Division of Highways, not more than two sequoias will be affected directly by lateral road construction. A sequoia of 11 feet diameter is on the up-slope side of Drainageway F. It has already been root-pruned to accommodate the existing roadway and the additional amount of pruning for the new road will be slight at most. It was shown in studies by Hartesveldt (1963 and 1963) that, while root-pruning caused a reduction in annual diameter growth, it has not, as of these dates, caused a tree to topple nor has crown vigor appeared lessened. While this seems to reduce concern for root-pruning, it should be taken for granted that, because of the role roots play in maintaining a sequoia's balance, a root-pruned tree would be more susceptible to toppling than if it had an entire root system.

Road ballast over the roots reduces soil moisture evaporation and thus far has resulted only in an increased rate of growth for sequoias so affected.

(5)

Only one sequoia of 4 foot diameter near Drainageway F is in a position to receive such a fill. It appears that the fill would be less than three feet deep and it appears that it would not be of damaging consequence to the tree.

Sequoias are a tree of the early stages of ecological succession. That is to say, they seed in most readily where disturbances to the soil occur. It is, then, to be expected that this species will probably seed in to the freshly exposed soil materials of road fills and possibly of road cuts. If end-hauling of rock is practiced and if soil materials could be incorporated with the fill rock used, the potential of sequoia regeneration will be greatly increased in those areas where parent trees exist.

Erosion Potential

The soils of sequoia groves are notably sandy and are developed largely over granitoid parent materials (Schubert, 1957). Some are schistose, but there is little apparent difference in the resulting soil texture or growth potential.

In 1963, 100 12-inch samples were taken from 12 sequoia groves and analyzed for texture. Soil types represented were only sands (33 percent), loamy sands (59 percent) and sandy loams (8 percent). Sand contents varied from 82 to 92 percent and clays from around 2 percent up to 17 percent. Higher clay contents were found only in the subsoil of a few drainageways of low relief (Hartesveldt, 1964). Clay is that fraction of the soil which is responsible for binding it together and resisting erosion. Thus, soils with such a small clay content are of a highly detachable nature especially where the protection of the leaf litter and root mat of plant communities has been disturbed or destroyed. There is much evidence of soil materials on the move in these two groves and I believe that it merits the most serious engineering consideration before any road building commences. To me, it constitutes the number one problem involved the preservation of park values.

As I studied the canyon of the East Fork of the Kaweah, I was impressed with the general instability of the soil and soil materials. The evidences of erosion are widespread. On the south side of the canyon west from Lookout Point, there are huge gaping gullies which appear not to be influenced by either roadway or trail runoff. I suspicion grazing to be the reason. On the north side of the canyon a quarter to a half mile east of the Lookout Point Ranger Station and below the road, there may be seen considerable areas of raw, bare ground both in gullies and on ridges. Vegetation, for some reason,

has not been able to reëstablish itself although all around it vegetation is dense. Likewise, across the present road from the Atwell Ranger Station is a broad expanse of nearly bare soil materials on a slight grade which seemingly should be vegetated. Even though these soils have notably poor, shallow profile development, the lack of plant life on them is without satisfactory explanation. The salient point is that the land here is highly erodible.

Soil samples taken by me from the Atwell Grove show that clay contents are only 1 to 3 percent of the total and that sand is as high as 91 percent.

Man-accelerated erosion is much in evidence. The up-slope cut surfaces for the present roadway show abundant signs of surface erosion and soil slumping. All of these materials are carried by runoff into the roadside drainage gutters and eventually transported in the stream culverts to the downslope side. The road surface and road ditches along side the road are also undergoing active erosion and the materials are ending up in the drainageways below.

Some of the culverts extend several feet out over the down-slope edge so that water is dropped anywhere from a few feet to the soil below up to as much as 8 or 10 feet. Erosion, which is a function of both speed and volume of the water, is thus greatly increased below at the point of impact. Erosion channels appear beneath nearly every one of these. While most of these gullies are still relatively small, one of them is huge (Fig. 2) with tons of soil materials having been washed out of it and deposited in the drainageway below. Sand deposition is abundantly apparent where the water from these culverts joins the streams. That it came from the roadway area is evident by the man-produced litter which is found mixed in with the sediments. It must be assumed that gullying by runoff is a phenomenon which, without special attention by man, usually goes on at a rate of speed in excess of plant stabilization. Each incipient gully, then, has the potential of extreme erosion.

Accumulations of eroded sediments in the canyon bottoms is considerable, especially in those with lesser gradients. However, I did not recognize any one place which had an accumulation of the proportion that might be dangerous to local sequoia trees. All of the gradients may be too steep for such an occurrence.

The erosion potential and the subsequent sedimentation are my chief concerns in the building of any road in a sequoia grove. I most strongly urge extreme care in the design of the drainage system for this roadway to

(*Fig. 2.* An immense gully below the road culvert on the west side of Drainageway E. *Omitted*)

avoid accelerated erosion and soil slumping.

Reports on Individual Drainageways

Each drainageway occupied by sequoias in the Redwood Creek and Atwell Groves was visited in the field. Identification letters were assigned to these drainages and are explained in terms of state triangulation markers as shown on the topographic maps provided by the State Division of Highways.

Stream gradients have been calculated for those portions of the streams below the proposed roadway and their profiles drawn as have the cross-sectional gradients. Sections of the state topographic maps have also been reproduced to show sequoias in the vicinity of and down drainage from the proposed roadway.

Drainageway A - Below triangulation marker N-21. See figures 3, 4 and 5.

Average stream gradient for this section - 25 percent.

Although the maximum cross sectional gradient averages on 38 percent, it is much steeper in some places and the soil is shallow throughout. The erosion potential here is moderately high. There is evidence of soil slumping and water erosion in several places.

There are two fallen sequoia trees in this drainageway which grow in very shallow accumulations of soil over solid rock which gives evidence of the instability of [illegible] such a situation.

Of the total of 15 sequoias in this drainageway below the proposed road crossing, 13 are growing in close proximity to the stream and could be endangered if additional water collecting on the new highway are diverted full force into the main channelway. No one of these sequoias is large, 27 inches being the largest. The smallest is only two inches diameter breast height.

One large 18-foot specimen has its root system exposed to the creek but appears to be high enough above the creek bed to withstand additional drainage water.

Some of the sequoias are small and suppressed because of insufficient light. Additional soil moisture would very likely weaken them in competition with the other trees. Additional soil moisture of moderate to high properties would almost certainly bring about their death.

This drainageway includes California nutmeg (Torreya californica Torr.) which is a species not common in sequoia groves.

(*Fig. 3.* Drainageway A, Atwell Grove, Sequoia National Park, California. *Omitted*)

(*Fig. 4.* Stream Profile of Drainageway A, Atwell Grove, Sequoia National Park, below triangulation Marker H-21. *Omitted*)

(*Fig. 5.* Cross Sectional Profile of Drainageway A from road center intersection with channel. *Omitted*)

Drainageway 2 - Below triangulation marker E-34. See figures 6, 7 and 8.

Average stream gradient for this section - 24 percent.

Weathered rock materials are deep in most parts of this drainageway below the proposed road crossing. The stream is only intermittent and shows little evidence of surface flow. Accumulations of sediments, however, are an indication of water high enough to transport it.

There will very likely be few problems encountered from additional runoff accumulating in this drainageway. Of the 13 sequoias below the proposed road, 9 are along the creek and roots might possibly be affected by additional water. Two large sequoias are growing right against the drainage channel, each leaning toward the creek and could pose a problem of toppling in the event the soil did become wetter.

(*Fig. 6.* Drainageway B, Atwell Grove, Sequoia National Park, California. *Omitted*)

(*Fig. 7.* Stream Profile of Drainageway B, Atwell Grove, Sequoia National Park, below triangulation Marker H-34. *Omitted*)

(*Fig. 8.* Cross Sectional Profile of Drainageway B from road center intersection with channel. *Omitted*)

Drainageway C - Below triangulation marker I-9. See figures 10, 11 and 12.
Average stream gradient for this section - 18 percent.

This drainageway is very rocky with thin accumulations of soil material throughout much of the portion surveyed. The stream channel is nearly all solid rock so that the volume of water transported is not apt to diminish much with distance from the road crossing. Thus, erosive potential and the soil softening potential are high throughout this drainageway. In addition to this, more water is carried in this drainage system than in most. High consideration should be given the handling of additional roadway drainage to be emptied into this canyon.

Of the 24 sequoia trees in this drainageway, 8 are near enough to the stream channel to be affected either by undercutting or by increased soil moisture. Some of the sequoias are small and suppressed and will very likely succumb to increased soil moisture.

It should be noted that some of the sequoias in this drainageway are actually much closer to the stream edge than shown on the state topographic map and are thus more susceptible to any increased water than is at first evident on the map. Their positions have been adjusted roughly on the following map (Fig. 10).

(*Fig. 10.* Drainageway C, Atwell Grove, Sequoia National Park, California. *Omitted*)

(*Fig. 11.* Stream Profile of Drainageway C, Atwell Grove, Sequoia National Park, below triangulation Marker I-9. *Omitted*)

(*Fig. 12.* Cross Sectional Profile of Drainageway C from road center intersection with channel. *Omitted*)

Drainageway B - Below triangulation markers I-16 and I-17. See figures 13, 14 and 15.

Average stream gradient for this section - 27 percent.

This drainageway has a relatively small watershed so that the volume of water it carries is small. Despite a fairly steep stream gradient and canyon sides (42 percent), soil materials have accumulated deeply. Water runoff has been slight and the actual drainage channel itself is inconspicuous. Only two sequoias are down-slope from the proposed road crossing. One is about 8 feet in diameter and the other about 15 inches. There are many impressively large incense cedars in this area.

Both sequoias are near enough the drainage channel to be influenced by any increased soil moisture. Unless a large quantity of water occurred here, they probably would not be seriously affected.

(*Fig. 13.* Drainageway D, Atwell Grove, Sequoia National Park, California. *Omitted*)

(*Fig. 14.* Stream Profile of Drainageway D, Atwell Grove, Sequoia National Park, below triangulation Markers I-16 and I-17. *Omitted*)

(*Fig. 15.* Cross Sectional Profile of Drainageway D from road center intersection with channel. *Omitted*)

* Drainageway E - Below triangulation marker I-21. See figs. 16, 17 and 18.

Average stream gradient for this section - 25 percent.

Drainageway E has a good flow of water and is rocky like Drainageway C. Erosion, soil slumping and sedimentation are abundantly evident here. Four large fallen sequoias accentuate the feeling of instability in this area. At least 8 sequoias are growing right against the creek bank near the junction of Drainageway F. One 11-foot specimen above the road crossing (shown on map for Drainageway F) will possibly require some root pruning and a 4-foot sequoia will require some addition of road ballast over its root system. The greatest concern for sequoias in this drainageway, however, is for sequoias growing along the creek. The 4-foot specimen whose root system will be buried with road ballast has a healthy, vigorous crown and very likely will respond favorably to the road construction.

Sedimentation is heavy in this drainageway. An immense gully mentioned earlier (Fig. 2) has been cut below a high culvert water drop and many tons of soil material are deposited along the creek channel below.

Like Drainageway C, water quantity and erosive potential are not apt to diminish much with distance down stream from the proposed roadway.

(*Fig. 16.* Drainageway E, Atwell Grove, Sequoia National Park, California. *Omitted*)

(*Fig. 17.* Stream Profile of Drainageway E, Atwell Grove, Sequoia National Park, below triangulation point I-21. *Omitted*)

(*Fig. 18.* Cross Sectional Profile of Drainageway E from road center intersection with channel. *Omitted*)

Drainageway F - Below triangulation marker I-25. See figures 19, 20 and 21.

Average stream gradient for this section - .4 percent.

This drainageway is not nearly as rocky as drainageways C and E. Development of soil materials is moderate to good and the water volume is apparently small. Although soil erosion potential seems to present little concern, there are accumulations of these materials backed up behind logs which have fallen across the creek indicating at least occasional high water.

Of the 12 sequoias in this drainageway, only two are apt to be affected by any increased runoff. There are others, however, which might possibly be affected by increased soil moisture.

(*Fig. 19.* Drainageway F, Atwell Grove, Sequoia National Park, California. *Omitted*)

(*Fig. 20.* Stream Profile of Drainageway F, Atwell Grove, Sequoia National Park, below triangulation Marker I-25. *Omitted*)

(*Fig. 21.* Cross Sectional Profile of Drainageway F from road center intersection with channel. *Omitted*)

Redwood Creek Drainageway - Figs. 22, 23, 24 and 25.

Average stream gradient for this section - 13 percent.

This exquisite canyon will undoubtedly require the greatest care of all to cross with a road. Although its gradient is only about 13 percent, its walls slope steeply up from the creek bed for an average of 72 percent. In several places, the slope exceeds 100 percent. Of the seven streams covered in this study, Redwood Creek carries the greatest volume of water and has the greatest erosion potential. The upper part of the surveyed portion is rocky and has thin accumulations of soil, while the lower part, where the gradient is less, has much deeper soil accumulations.

Erosion and sedimentation are everywhere evident. Much sand from the present roadway has been carried into the stream bed and has settled out behind the jumbles of logs and limbs there. In spite of plans to bridge this deep canyon because of the depth, accelerated erosion is very likely to be a major problem no matter what engineering activities occur there. All possible attention must be given to minimize construction disturbances to the steep banks and the disposition of roadway should also be carefully planned and implemented to avoid any erosive accumulations of water at any one point. Although only three sequoia trees are in jeopardy below the proposed roadway, the potential for erosion and sedimentation is high and could be disastrous if it occurred regardless of its effects upon sequoia trees.

Of the 32 groves of giant sequoias familiar to the author, this drainageway provides one of the most unique compositions of plants he has seen in association with sequoias. This in itself makes the utmost protection desirable. Contrary to the community composition in the other drainage channels, there is very little white fir (Abies concolor(Gord and Glend.)Lindl.) which normally constitutes the most abundant tree species in the later stages of plant succession. In its place is an unusual assemblage of very large white alders (Alnus rhombifolia Nutt.) with trunks approaching the maximum diameter range of 2 to 3 feet. There are also many very large canyon live oaks (Quercus chrysolepis Liebm), large incense cedars (Libocedrus decurrens Torr), ponderosa pine (Pinus ponderosa(Dougl.) ex p. & C. Lawson), sugar pines (Pinus lambertiana Dougl.), California nutmegs (Torreya californica Torr.), California bay (Umbellularia californica (H. & A.) Nutt.) and deer brush (Ceanothus integerrimus H. & A.)

Other plants scarce in sequoia groves are alum root (Heuchra sp.),

Western azalea (Rhododendron occidentale (T. & G.) Gray) and one of the stone crops (probably Cotyledon sp.).

The plant communities of this drainageway are of great beauty and of scientific interest. (Fig. 25.)

(*Fig. 22.* Redwood Creek Drainageway, Redwood Creek Grove, Sequoia National Park, California. *Omitted*)

(*Fig. 23.* Cross Sectional Profile of Redwood Creek Drainage-way from road center intersection with channel. *Omitted*)

(*Fig. 24.* Stream Profile of Redwood Creek Drainageway, Redwood Creek Grove, Sequoia National Park. *Omitted*)

(*Fig. 25.* View of Redwood Creek showing uncommon assemblage of white alders in a sequoia grove. *Omitted*)

Resumé

1. In the two groves, there are a total of at least 103 giant sequoias below the proposed highway. Of these, 45 are in a position of possible jeopardy because of road construction. On some of these, the possibility is admittedly slight.
2. Soils in the two groves are notably sandy with clay contents too small to be binding. Hence, the soils have a high degree of detachability and are expected to erode severely with disturbances.
3. The profiles of the streams vary from 13 to 41 percent and the cross-sectional profiles exceed 100 percent in some places. Steepness of slope is a major factor in soil erodability.
4. Erosion potential is greatest in Drainageways C and E and in Redwood Creek. The latter, with slopes averaging 72 percent, presents a considerable problem both in construction and from increased runoff resulting from the road surface.
5. The greatest concern in the engineering design should be the safe disposition of roadway runoff. Every attempt should be made to avoid the accumulations of water in erosive proportions. Streamside sequoias (and other species too) are less stable where runoff wets the soil excessively or erodes it from the supporting roots.
6. Road cuts should be sloped and possibly planted to avoid the slumping of soil materials and its subsequent erosion into the stream beds.
7. Redwood Creek Canyon represents an ecological association which is at least rare in sequoia communities and thus merits especial care. It has the steepest walls and carries the greatest volume of water of the seven drainages in this study.

Respectfully submitted,

Richard J. Hartesveldt

Richard J. Hartesveldt

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EXHIBIT E
The Disney Proposed Master Plan for the Development of Mineral King, California
(Entire master plan, in book form, submitted in testimony)

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WALT DISNEY PRODUCTIONS

January 21, 1969

Mr. Costley:

After one quick review of the Mineral King Master Plan, I have a few comments to offer:

1. Horse concession. - It appears that this could cause serious problems in sanitation and esthetics where there is very limited area in which to operate. Presumably, this would be a large operation involving at least 50 horses. The trails would have to be surfaced to control erosion. More serious, however, would be sanitation and the need to supply all needed forage.

2. Alternatives for sewage disposal. - The plan shows 2 primary sewage facilities and provides that effluent will be filtered through soil enroute to the stream drainage. With the large quantity of daily sewage discharge expected, I would question whether the soil can adequately handle the effluent. Should alternatives be considered, such as piping effluent out of the canyon, etc.?

3. Check dams to collect debris. - The Plan is not clear on the purpose or function of these dams. Presumably they are to prevent damage from flooding and from debris accumulation. Is a dry-dam type structure planned? Also, what is the source of the debris? Will it result from timber cutting on the ski runs?

In conclusion, I would hope that we study the impacts of this concession for a long time before permitting another one.

W. O. Hanson
Director of Wildlife Management

UNITED STATES DEPARTMENT OF AGRICULTURE
FOREST SERVICE

[illegible]

[illegible] 1720 Special Use Permits (2300) January 21, 1960

[illegible] Special Use Permits (Minaret Ring)

[illegible] Director, Division of Recreation

The following comments on the Disney Master Plan for Minaret Ring are provided for your consideration.

General statements in the plan refer to "slope preparation and grooming." It is suggested that a close look be taken at the degree of slope manipulation permitted. It would appear that such treatment should be limited considering the amount of snow pack. Planning should provide for maximum retention of native cover vegetation and effective stabilization and cover establishment on all areas disturbed during development. Ex mention should be located relating to restoration measures for disturbed areas (slopes, pipelines, trails, etc.). /

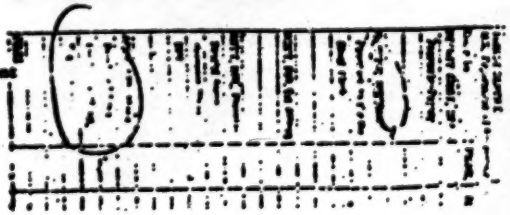
We are not fully appreciative of the material concerned with "Flood and Debris Control." Floods have not presented a particular problem in this area to the best of our knowledge. Perhaps action is needed under the development plan to correct normal cutting and washing.

To what degree has the compatibility of planned horse programs with resource needs been determined? The projected use by people, in itself, will have a very real impact on these fragile soils and vegetation without the additional effect of horse use. Any horse activity as well as others influencing soils and vegetation should well utilize the services of an ecologist during the planning stage. //

One gets the impression that the Region largely accepts the Disney Plan in its present form. Granted, the recreational planning aspects of the project are based on thorough and outstanding research. However, there is real need for basic consideration of soils and vegetation.

We appreciate the opportunity of reviewing this material.

for [illegible]
E. H. Reid
Director of Range Management



UNITED STATES GOVERNMENT

Memorandum

Department of Agriculture—Forest Service
San Francisco, California 94111

To : Forest Supervisor, Sequoia N. F. Attn: 2510

From : W. S. Davis, Chief, Division of Recreation Date: January 9, 1967

Subject: Plumas - Preliminary Site Studies Proposed Development of Mineral King Your reference: 11/18/66

We are returning the Dames and Moore report of preliminary Mineral King studies, accompanied by copies of comments from the Division of Engineering and the Division of Range and Wildlife Management. Watershed Management also reviewed the report but did not prepare an analysis memorandum, indicating they would go along with the comments of the other two Divisions.

You have already received a copy of our memorandum of November 29, 1966 requesting advice on specific points from the three Divisions.

Engineering may not have been aware that in accepting the Disney proposal, we agreed to the concept of a village with underground automotive service facilities for deliveries, maintenance, etc. This brings with it a need for land modification, earth moving, and possibly stream channel changing beyond what we might normally permit. The underground roadways and chambers must either be tunneled or built partially on the surface, boxed in and backfilled. The report favors the latter, which means a great deal of earth and debris moving. But we can require that all this be accompanied by an effective landscaping program.

Both Engineering and Range and Wildlife recommend developing a water supply without adversely affecting streamflow. The report suggests diverting 900 gallons per minute from a point low down on Monarch Creek. This would materially affect streamflow between that point and the confluence of Monarch Creek with the Kaweah River. However, the distance would be short, a few hundred feet at the most. A good part of it would fall within the village itself, and might even be underground. We have a situation here where fishery considerations would assume less importance than normally as far as the lower end of Monarch Creek is concerned. But the reduced flow would also have an effect on the Kaweah River downstream from Monarch Creek, and here is where the factor of return flow from effluents should be considered.

Engineering agrees with us that the number of debris dams seems excessive. However, they have also mentioned to us their high regard for Mr. Paul Banner, who is listed on the last page of the report as an engineering consultant for the project. He worked for many years on the Los Angeles County Flood Control District on runoff and debris problems within the Angeles National Forest, and has a good concern for protecting the land. He should be a good contact to work with.

On the matter of water rights, the most recent position of the Forest Service is that the establishment of the National Forests reserved to the government

EXHIBIT P

the right to use as much water originating therein as is necessary for the management of the multiple resources. In general we have included the needs of our permittees under this assertion of rights, but the substantial water needs of the Disney project may perhaps place it in a special category. Mr. Fair suggests that you make no commitments on this point now, but make a specific request to him for review and advice as soon as the first submission of Disney development plans is made.

The final paragraph in the Division of Range and Wildlife's memorandum of January 6, is one with which everyone surely agrees in principle. The impact is certain to be heaviest at the village site and on the valley floor. By accepting the development proposal we have also accepted that some effect on fishery values, streamflow, vegetation, soil, and other resources must be provided for. I'm certain you agree that any comments to Walt Disney Enterprises on the Dames and Moore report would be untenable if they were not made in full recognition of this.

The first paragraph of Mr. Wyckoff's letter of November 15, 1966 to Robert Hicks perhaps implies that further comment on the report would be sent to Walt Disney Productions by the Regional Office. We think it best, however, that you follow up with a further letter based on our review observations, and send us a copy. Then we will continue to minimize direct communication between the Regional Office and the permittee.

Enclosures

cc: Sequoia N.F.

L. A. Iorns

UNITED STATES GOVERNMENT

Memorandum

Department of Agriculture—Forest Service
San Francisco, California 94111

TO : Recreation File No. 2320

FROM : Range & Wildlife Management Date January 6, 1967

SUBJECT: Plans - Preliminary Site Studies Proposed Your reference 11-29-66
Development of Mineral King
Sequoia N.F.

We have reviewed subject report, and herewith supply our comments and forward report to Watershed Management as requested in Mr. Davis memorandum of November 29, 1966. We have included the comments of the Sequoia and R.O. Division of Engineering in our review, and are in basic agreement with their findings as qualified in our marginal notes thereon.

We feel the report is rather superficial, and the investigations it covers apparently very general and sketchy. Consequently we consider many of the assumptions made and conclusions reached are inadequately founded and unacceptable. We have indicated some of our thoughts in brief marginal notes in the report; our major points, preceded by answers to your memo questions, follow:

1. Streamflow releases

From the standpoint of quantity, depending upon method of timing, of collection and return to streams, and well downstream of major point of return, possibly yes. From the standpoint of quality, probably not. Additionally there would be an appreciable reach of stream seriously damaged by dewatering between points of diversion and return.

2. Channel diversions

We would be basically very strongly opposed to any stream diversions in this typically small-stream, low-flow area. If the term "diversion" is taken to mean re-alignment, or channel-change, we are still opposed in principle but would be willing to consider specific proposals thoroughly on an individual case basis; a guiding principle would be to tolerate very few even well-supported instances.

3. Valley dam

The proposed "Valley Debris Dam" site and plan looks very damaging to fisheries alone, in addition to the obvious general objections. An appreciable reach of minaret and several important tributaries would be affected, in an area where all the stream capacity available is singularly important. We feel the potential of this debris basin to provide general water-oriented recreation is very limited, and practically non-existent for fisheries.

EXHIBIT Q

(4)

The total basic concept of development appears badly biased in orientation toward a highly artificial, continued situation, without any real attention to ecological factors and needs to multiple use management. The extent and nature of proposed alteration of the basin is unacceptable to us--the damage extend beyond effects on fish and wildlife, and these alone are critical.

Specifically, stream diversions and channel treatment, flood and debris control, surface water supply development, and sewage disposal proposals are all of a nature we find severely damaging or unacceptable.

It is recognized that development of high intensity year-round recreational use in this restricted fragile sub-alpine area is bound to result in pronounced impacts and certain unavoidable changes. However, we feel it is imperative to retain much of the original basic ecological uniqueness of this basin, and that this is possible with careful, thoughtful planning. It is not evident that the consultants have brought this approach to their work so far, and we strongly urge that the Sequoia, with your help, assist in correcting this weakness by full comment on the Report and personal briefing if necessary.

cc: WSI (w/Report)
Regional Office.

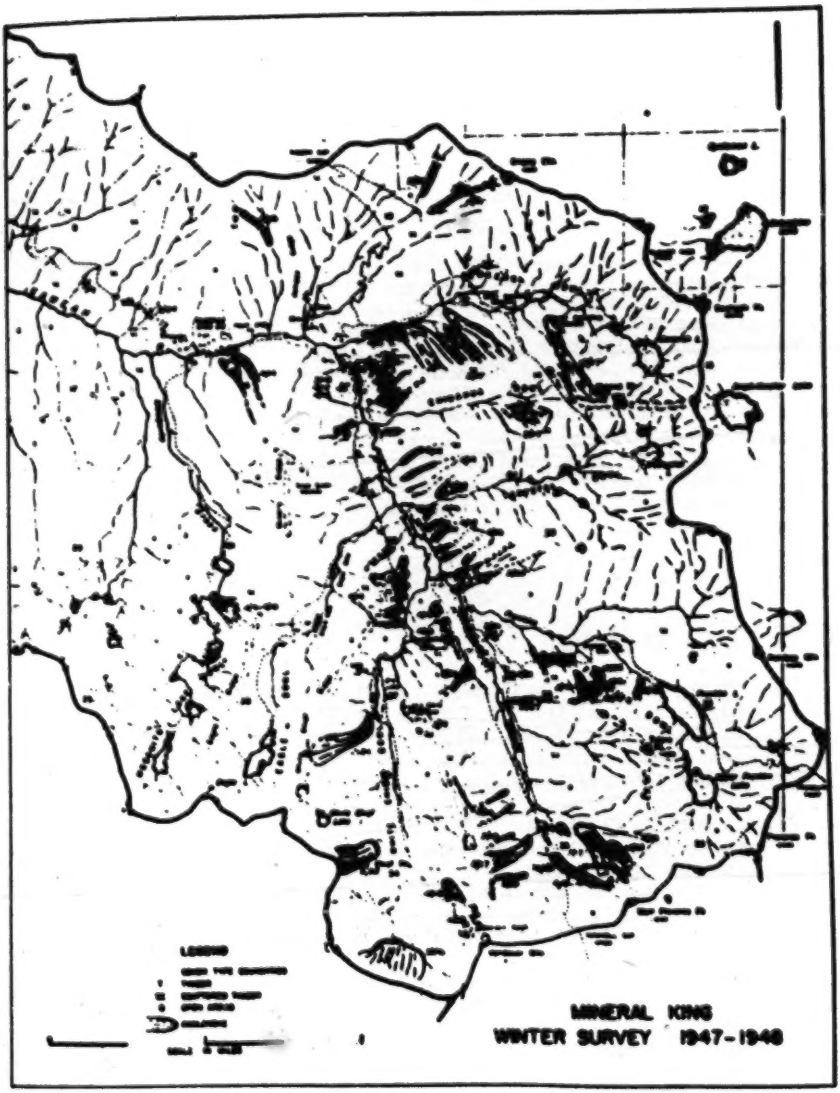


EXHIBIT R

Vete Wyckoff

2310

November 18, 1958

Mr. Robert Hicks
Walt Disney Productions
500 South Buena Vista
Burbank, California 91505

Dear Bob,

We appreciate your giving us the "Report of Preliminary Site Studies, Proposed Development of Mineral Mine for Walt Disney Productions by Burns and Moore, account number 6166-021-02. We will send our copy to the Regional Office for further review and comment. In the meantime the following are our comments:

(1) In the report summary, under No. 3. Nowhere in the report is the exact location of the "source of select fill material" defined. I would like to know more specifically where this source of material is.

(2) On Page 7, second paragraph. We presume the use of large boulders for stream and channel stabilization will be in the form of placing these boulders in correct positions rather than just dumping them at certain locations where stream and channel stabilization are thought to be required.

(3) On Page 9, first paragraph. We question the advisability of changing the river channel as indicated. There is not much room at this location, and the use of equipment in the existing channel may be more detrimental than the slight additional area made available. Also there are numerous trees growing in the river channel and we want to have these remain in place.

Under the village area, I wonder if your plans have changed as to the location. The original premise was that the new village would straddle Kenneth Creek. Now it appears that the entire village area will be to the west of Kenneth Creek extending down to Canal Rock. This, of course, puts the village across the present avalanche path. I wonder if the report actually means this?

(4) Page 11 under Aspen Flat Area. I'm not quite sure where they propose to possibly shift the existing Kenneth River channel.

EXHIBIT S

The only spot would be to the north of Aspen Flat proper where the river channel spreads out into the flood plain. If this is the idea it may have some merit; but if they are thinking of changing the channel further to the south along the eastern edge of Aspen Flat then we question this drastic change in topography.

(5) Page 20, number 1. We wonder if all the check dams proposed would be needed, how they would be constructed, and what access would be required to construct such dams. I don't believe we can stand the slope disturbance of building access roads to each of these dam sites.

(6) Page 21, first paragraph first sentence. The use of the check dam structures may be effective for water runoff but would have little value as regards snow avalanche. They are too small and would be quickly covered by snow and in the long drainage coming from Empire Mountain would not reduce the slope sufficiently to retard an avalanche.

(7) Page 22, number two, Hamreh Creek - There may be a conflict in putting check dams in Hamreh Creek with the fisheries. It may be we can establish a better fish habitat in Hamreh Creek which would enhance the value of that drainage.

(8) Page 23, second paragraph. We question the advisability of such a large dam. Aesthetically such a structure 30 feet high would not be compatible with the site and would have an adverse effect on the scenery. A small dam with a small lake behind it may be acceptable.

(9) Page 26. In general any channel work done in live streams must take serious consideration of sedimentation. We must work closely with the California Fish and Game Department on all activities to assure the fisheries habitat remains in a satisfactory condition. Also channel improvement work should be done with an eye to retaining as much natural appearance as possible.

(10) Page 29. A one cubic foot per second flow down the main drainage we do not feel is adequate for fish and aesthetics. We will make further study on the needs here but tentatively we should consider a minimum of 1.5 to 2 cubic feet per second flow down the Hamreh from Mineral Ridge.

(11) Page 33. Any sewage treatment must have the complete approval of the various public agencies involved with sanitation and stream pollution. Unless absolute and complete treatment of effluent is considered no doubt whether direct discharge into the Hamreh River would be satisfactory. Again consideration must be given to the use of the waters below for domestic purposes, swimming and fishing.

In general the report is good. It shows the areas needing further study and instrumentation. We hope the Disney Corporation will utilize the many suggestions in the report to further the knowledge of the Donald King area.

Sincerely yours,

PJW

P. J. WYKOFF
Mineral King Staff Specialist

Enclosure

cc: Dale River
cc: P. J. Wykoff ✓
cc: Regional Office

OCT 1 0 1958

Dear Orville:

Your letter of September 27 referred to the proposed road to Cheral King to service the planned Disney development.

No permit has been issued for construction of this road because the National Park Service has not reached agreement with the Forest Service and State Highway Department as to location and design standards of the road, and plans for needed utility lines. When these matters have been resolved, the permit will be issued.

In addition to our desire to minimize the damage to park values by this road, we are concerned about what we have been told concerning the size of the planned Disney development. Will one two-lane road of park standards be adequate, or will Interior later receive a request for another road?

Sincerely yours,

(Sgd) Stewart

Secretary of the Interior

Hon. Orville L. Freeman
Secretary of Agriculture

EXHIBIT 1

WASHINGTON, D.C. 20240

NOV 19 1968

Dear Orville:

I am enclosing, for your information, a copy of the letter from the National Park Service to the Chief of the Forest Service, giving approval to the State of California, Division of Highways' selection of a route for a road through Sequoia National Park to Mineral King. This, of course, is subject to agreement on design standards.

I ask your continued support to make certain that the road constructed will be a credit to our respective Departments. I also would like to repeat the request contained in my letter of October 16, that Interior be assured that the Disney development will not require additional road access across park lands at a future date.

Sincerely yours,

Secretary of the Interior

Hon. Orville L. Freeman
Secretary of Agriculture
Washington, D. C.

Enclosure

EXHIBIT 4

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

L3027-2NK

NOV 13 '58

Mr. Edward P. Cliff
Chief, Forest Service
U. S. Department of Agriculture
Washington, D. C.

Dear Mr. Cliff:

Following the meeting in San Francisco on October 7, and subsequent field meetings, we have reviewed all material available to us on the proposed location of the Mineral King road. On the basis of this review, we now agree that the Division of Highways' route should be selected.

Certain of the standards, as now proposed by the State, are not acceptable to us. We suggest the Division of Highways and Forest Service work with us to establish satisfactory design criteria. We propose that many of our consultant's recommendations on the use of additional bridges, tunnels, viaducts, cribbing, retaining walls and other methods be fully exploited so, as Secretary Freeman stated, "this will be a model project that will be copied, not criticized." The National Park Service will assign personnel to work with the Forest Service and the Division of Highways in the selection of standards, design and during construction.

We request your assurance that the Forest Service and the Division of Highways will work with our people to construct a road of park-like quality which will be a credit to the Forest Service and the National Park Service.

Sincerely yours,

(Sgd.) Edward A. Hummel

Edward A. Hummel
Associate Director

cc:
Hon. Orville L. Freeman
Secretary of Agriculture
Washington, D. C.

EXHIBIT V

UNITED STATES
DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE
WASHINGTON, D.C. 20240

IN REPLY REFER TO:

[illegible]-CR April 1, 1968

Mr. James G. Cooper
7313 Gladden, N. E.
Albuquerque, New Mexico 87110

Dear Mr. Cooper:

Secretary of the Interior Udall has asked that we reply to your letter regarding the proposed Mineral King development as it relates to Sequoia National Park.

It was with great reluctance that Secretary Udall agreed with Secretary of Agriculture Freeman that the access to Mineral King would be by a road through a portion of Sequoia National Park.

The preservation of the natural beauty of the national park, the perpetuation of an interesting and important natural ecological system, and the construction of a road to meet National Park Service standards will all be a part of a cooperative agreement relative to this development. We assure you that the values of Sequoia National Park will not be overlooked.

Sincerely yours,

Director

EXHIBIT W

REPORT ON ROAD TO MINERAL KING

ON

SEQUOIA NATIONAL PARK, THREE RIVERS, CALIFORNIA

At the request of the Associate Director of the National Park Service, Willian Everhart, an investigation was made of the proposed highway from Three Rivers, California to Mineral King, which highway, if built, will traverse the southwesterly section of Sequoia National Park. A map showing the general location of this road appears as Plate I of this report.

The California State Highway Department proposes to build a two-lane, two-directional road across the National Forest and National Park lands to service the proposed recreational developments in the Mineral King Canyon.

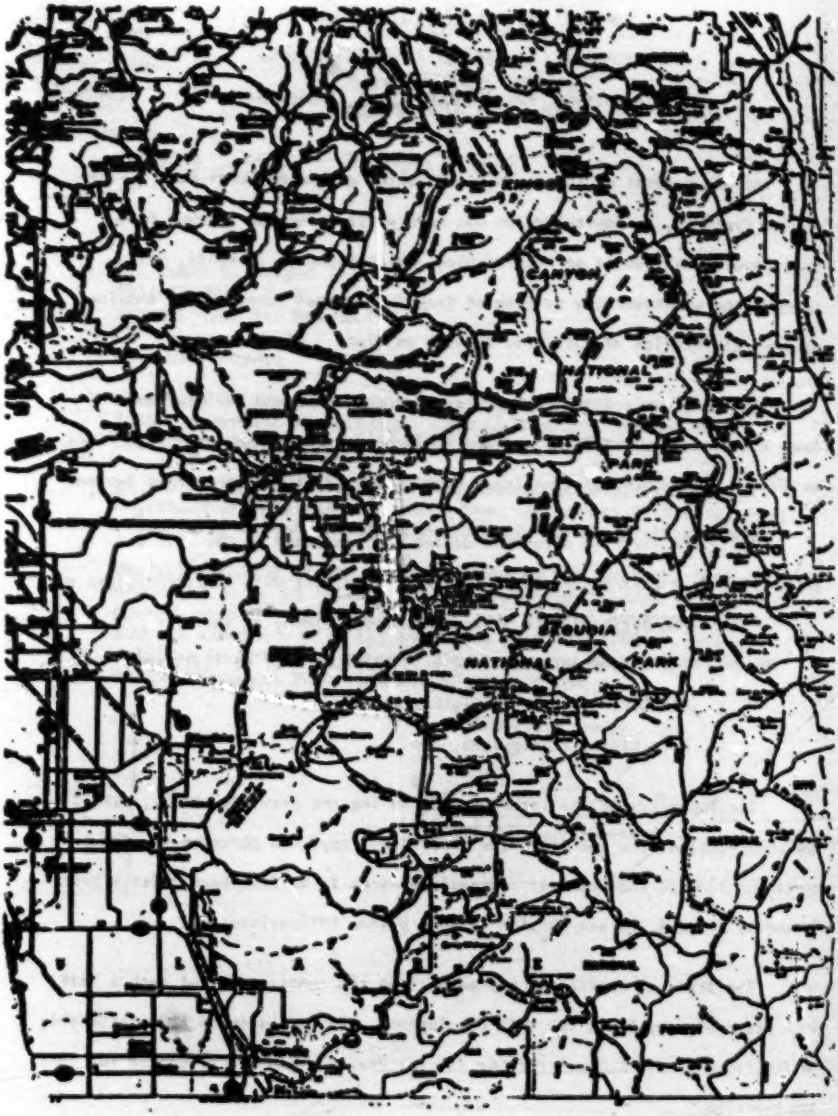
Visits to the site were made during the last week of May 1968 and conferences were held at the Sequoia Park Headquarters with representatives of:

The National Park Service, U.S. Department of Interior
The U.S. Forest Service, U.S. Department of Agriculture
The California State Highway Department
Walt Disney Enterprises, Inc.

The Secretary of the Interior had, during the previous winter, agreed to the construction of a two-lane, two-directional road, to serve as the transportation link to the proposed recreational area to be developed under a permit issued by the U.S. Forest Service by Walt Disney Enterprises.

The State of California had authorized the construction of such a road with state highway funds for this development. As far as could be ascertained, no Federal Highway, Federal Park or Federal Forest funds are allocated for this construction.

EXHIBIT X


CANYON
NATIONAL
PARK
ZION
NATIONAL
PARK

Prior to the approval by the Secretary of the Interior, studies had been made by Walt Disney Enterprises as to whether or not another mode (other than individual cars, trucks or buses on a public highway) of transportation would be economical and feasible. Apparently, other forms were eliminated and this study was made only on the basis of a highway and normal highway use, where it should be, and how it should be built to preserve to the greatest degree, the ecological purposes of the park.

The purposes and objectives of Sequoia and Kings Canyon National Park as given in N.P.S report of April 1966 entitled "National Sciences Research Plan" as follows:

> "The various Acts of establishment, and related legislation, indicate that the primary purposes and objectives of these parks are to exemplify and maintain for posterity (1) The giant Sequoia and all other Sierran vegetation types present in the parks; (2) All native animal life associated therewith; (3) All other natural features including the geology, which collectively typify in these parks the primitive wilderness scenery of the Sierra Nevada."

Obviously, any road construction to present-day standards could not be built through this area without affecting the ecology of the area. Within the road prism (cuts and fills) plant life would, of course, be disturbed and since the top soil for regenerating plant life is sparse, early vegetative cover on cut and fill slopes would be very slow in developing.

More than that, the road, if primarily based on cut and fill construction, would be a barrier to wild life and visitor movements throughout this area of the park. Animals and men would have to cross the road to the risk not only of such persons and wild life, but also to users of the highway.

Among the wildlife species of this area are deer, wolf, mountain lions, beaver, bear and big horn sheep. The retention and control of these species would be affected if relatively free movement up and down their slopes was not maintained.

With the increased visitations to the park has come a considerable increase in back country camper use through a section of which the proposed road would pass. (See "Back Country Management Plan," 1963, N.P.S).

It would appear, therefore, that to reduce the impact on this area, any road should be devised with a minimum of new raw slopes and with a maximum of freedom of movement across the road location.

The primary purpose of the proposed highway is to serve the Mineral King development. It is anticipated that up to 14,000 persons will be served here each day. Of these, approximately two-thirds will be daytime visitors (traveling to and from the area in the same day) and one-third will be overnight visitors staying one or more nights at Mineral King.

In addition, at Silver City at the approach to Mineral King Canyon, there is proposed another development of year-round residence units, the present number of which has not been firmed up. There are privately-owned camps, ranches, etc., along the transportation corridor; these are far as far as their effect in traffic load is concerned, but they must be considered by any future undertaking.

The California Highway Department estimates its peak travel load in any one direction to be 850 vehicles per hour, primarily passenger cars with some buses. Service trucks can be scheduled for off-peak operation. About 150 campsites operated by the Forest Service will continue the usage, although small, of home trailers and travel camper units.

I consider the projected peak hour flows, 850 vehicles per hour, low for this service. It can only be maintained if at the end of a ski week-end, vehicles are not allowed to leave the area in a period stretching over less than three hours. Whether or not this control can be maintained is doubtful.

Recommended Solution No. 1

There already exists an existing road serving Mineral King from Route 198 at Three Rivers.

It is a widened trail which winds up the mountain, has grades in excess of 15%, is narrower than two lanes in many areas, and would not handle the anticipated traffic. It is only partially paved with a bituminous surface treatment. While the existing road will not handle the anticipated traffic load, it does represent existing fill and cut scars throughout the area. It serves existing private properties and would serve as a construction road.

To locate a new road in another corridor would mean:

1. Duplication of the terrain scars
2. New access roads for construction
3. Additional spur roads to regain access to existing private properties.

In this regard, it can be assumed that the existing property owners can continue to be served by the old road as at present. From a public policy standpoint, I doubt that these people will remain silent at losing their existing privacy and not be compensated by the use of the new road facility. Continued utilization of the old road for existing users, not served by the new road, would perpetuate existing scars and county maintenance costs.

In any case, a new road location means new additional scars to a great degree which, because of the very limited capability of the soils to renew growth, will be there for many years to come. Be it noted here that along the old road very few of the old scars have received any ground cover although these scars are many years old.

A trial line was run using existing mapping on the old road location corridor to see if a new road to adequate standards could be constructed to destroy the old scars within the new roadway prism.

Plates II, Plan and III, Profile, show that this can be done to cover up or release for obliteration, approximately two-thirds of the old road. Those parts not covered or destroyed are best left alone for other reasons:

a) At the lower end near Route 198, present real estate developments will need the old road for their purposes. This section of the old road also has the steepest grades.

b) In the Atwell Grove area and Redwood Canyon area, the old road does not represent a scar but blends well with the existing terrain. To attempt to use these parts would cause destruction of Sequoia Groves needing preservation and elimination of quiet, shaded and pleasant drives through the Sequoias.

c) Along the remainder of the route where sections of the old road are left, tourist sites for camping, picnicking, fishing and other recreational purposes would be nicely served away from the busier traffic flow.

The road shown on Plates II and III do meet the requirements of service to Mineral King as well as that proposed on new location by the State. This is

a first cut trial line developed from existing maps, aerial surveys and one field visit. With more adequate survey data, soils exploration, etc., a more adequate and improved alignment and profile would result.

The use of the old road corridor or modifications thereof, as shown in these exhibits, will preserve the Sequoias, will reduce the ultimate total scar and disruption of plant life, and will serve existing privately-held properties and construction operations with considerably less additional scar.

I strongly recommend that the State Highway Department expand its survey area and study lines in this corridor. Although full geologic data is not available, it is believed that the state should find this corridor less expensive than the one it has chosen.

Throughout the entire length of the two corridors studied - that proposed by the state and that proposed herein - landslides seem to be a prevalent geologic condition. While this is a relatively light rainfall region, occasional heavy storms and the annual spring snow thaw represent a hazard in this country. Evidence of slides is throughout the area. Further, I believe that a substantial amount of the geology of the proposed corridors is similar to that along the alignment of Route 198 in Three Rivers. Here, several slides have occurred in the few years this construction has been completed, which slides have been rather expensive to repair.

It was further noted that on the easterly side of the valley through which the road corridors are planned, it is believed that the dip of the ledge is adverse to construction; whereas, the use of the westerly side of the valley on which the old road was in part located, seems less hazardous to ledge slides due to dip direction. The old road location presents less length susceptible to this conditon. This is from field views only. A geologic study should be made.

In either event, the use of heavy fills in susceptible slide country represents a definite construction hazard and one which can be substantially reduced by the use of bridge structures as proposed here in solution recommendation No. II.

The use of the old road corridor, since a satisfactory line and grade can be obtained, offers several substantial economies: (1) because construction hazards should be reduced (2) substantially reduced requirements for construction access roads (3) reduced roads to service private properties if it is required to connect them with the new road.

No estimate of cost was made on this line and grade since it is believed that more detailed surveys than those available would be needed to develop even reasonable reconnaissance estimates. It is not believed that heavier cuts and fills or more expensive use of structures and cribbing would be encountered on this general location that that which will be encountered on the originally proposed line.

The scenic value of these mountains can be developed with equal ability on either line. The old road location adds the ability to utilize sections of the old road for scenic areas, picnic areas, fishing and quiet camping grounds.

If this is done, it is strongly recommended that the line and grade be developed in this corridor along the lines of design criteria given here in recommended method No. II. These criteria would include:

1. Optimize the use of crib retaining walls using "rusting steel" for such work to reduce scars, reduce the length of box culverts for drainage purposes and reduce earthwork requirements.
2. Optimize the use of structures rather than earthwork. As shown herein, this should reduce construction costs as well as

scar and permit better cross movement of animals, plant life and visitors to this area.

Recommended Construction Method No. II

Earthwork scars, which in this area are likely to be permanent, result in direct proportion to the amount of earthwork moved.

In this rough country because of the steepness of existing hillsides and the height of these lower mountainous areas, backslopes in cuts reach well up on the mountain sides before natural ground is again reached. Likewise, in fills, although the roadway surface is only 28 feet, the bottom of the embankment prism in many areas, approaches 800 and 1,000 feet using the 1 1/2 on 1 slopes that the highway department recommends. If less stable material is encountered than will stand on 1 1/2 to 1 safely, these fill and cut slopes will, of course, be larger and wider.

For the most part, the geology of this area indicates heavy rock excavation which should stand on a 1 1/2 to 1 slope for embankments and remain on a 3/4 to 1 slope in cuts, but there will be some areas which will not, particularly in the disintegrated granite sections.

[illegible] had

To study the comparative effects of a road in the National Park developed along the lines of earthwork versus such a line maximizing bridgework, a section of the State's proposed alignment from approximately Station 990 to approximately Station 1170 was selected. This is approximately 18,400 feet long (equation accounts for the difference).

The California Highway Department line and profile anticipates an earthwork solution for the entire length except for Redwood Creek where a 1,800-foot bridge is planned to avoid destruction of the Sequoia grove in this area. See Plate IV. This type of roadway design shows massive cuts and fills based on 3/4 to 1 backslopes and 1 1/2 to 1 embankment slopes.

Our study line between these two points is 17,750 feet in length. This difference in length develops a small economy in itself, but results in a somewhat smoother alignment which, in reducing curves, aids somewhat in traffic operations.

Within this 17,750 feet, all cuts and fills in excess of 60 feet are provided with cribbing 40 feet high; when over 100 , two rows of 40-feet high cribbing is used. It is recommended that "rusting steel" be used for this work which is somewhat more expensive than concrete, galvanized steel, or bonderized steel, but it will more nearly blend with the predominantly brown tones of the countryside. A price of $8.80 per sqare foot for this cribbing has been estimated.

Cribbing, though expensive, is less expensive than masonry work and as in all walls or cribs, it reduces both the cost of earthwork and the length and cost of drainage structures through fill areas. See Plate VI. (Typical Section).

In order to measure the comparative costs of the two solutions in this cost area, the following unit prices were used:

Excavation - (which is believed to be mostly ledge) from California Highway Department — $1.10 C.Y.

Total cost of roadway work including surfacing, guardrail, landscaping, etc., - 2.5 x excavation cost. This is a normal relationship

where only normal drainage pipes, etc., are involved and is borne out by Kern County, California projects, the bid prices for which were supplied by the California Highway Department.

In the Sequoia case, due to large fills, relatively large drainage areas, amount of tree-fall debris, etc., on mountain slopes and need to reduce water run-off concentration, it is estimated that $3,500,000 is needed for major drainage box culverts or similar, based on estimates of $150 to $900 per linear foot of such structures with adequate waterway openings.

Bridge unit costs (from California Highway Dept.),(with interpretations)

Maximum Bent Height -

50 ft.	$27.10
65 ft.	29.40
70 ft.	29.90
75 ft.	30.60
95 ft.	32.10
120 ft.	34.00
200 ft.	40.60

In the normal highway job, it is usual to anticipate that earthwork solutions will be cheaper than structural solutions.

In the case of mountain locations as in this area of the Sierras, this is not always true.

Extensive cutting and filling in mountainous areas is accompanied by extreme backslopes and embankment slopes to accomplish a stable earthwork condition. In the present case, embankments as much as 600 feet and 700 feet

wide at the bottom of the prism are required to hold up a more 28 foot for highway width.

In such cases, the use of structures is sometimes warranted.

Result

Our calculations indicate that in the case of this road (our study section of 18,400 feet is considered to be an average condition for the entire highway), the structural solution can be cheaper in initial construction cost and in annual maintenance cost.

California Proposed Design		
Length:	18,400 feet	
Length of Bridges:	1,000 feet	
Excavation Quantity	2,307,000 cu. yds.	
Cost of Roadwork:	$ 6,300,000	
Additional Cost of Major Drainage:	3,500,000	
Cost of 1 Bridge:	1,540,000	
Cost of Cribbing:	$ 4,000,000	
Total Estimated Cost	15,340,000	$15,340,000

Clarkeson's Proposed Design		
Length:	17,750 feet	
Length of 10 Bridges:	5,400 feet	
Excavation Quantity:	850,000 cu. yds.	
Cost of Roadwork	$ 2,400,000	
Cost of Bridges:	7,000,000	

Additional Cost of Major Drainage:	$ 500,000	
Cost of Cribbing:	1,900,000	
Total Estimated Cost	$ 11,600,000	$ 11,800,000

Although I believe that the structural costs of the bridges are high (a study of California's bridge costs for several years back and a study of large highway bridges in more remote areas of western Canada would indicate that these unit prices are high), there would still be a decided saving in the cost of the highway if the structural design method were used. This savings of almost $1,000,000 in this test section would indicate a saving of several times this amount for this entire road.

Maintenance Costs

There are no authentic comparative costs for maintenance in any state. Maintenance accounting practices are a principal reason for this since resurfacing is maintenance in one area and is reconstruction in another. The difference is in degree of maintenance and in the efficiency of maintenance crews which cause wide variations in "maintenance costs."

Unless the bridges need repainting, and this can be avoided by the use of concrete or "rusting" steel, bridge maintenance costs are usually considerably lower than roadway maintenance costs on soil foundations in cuts and fills.

Snow and ice removal is generally equal per mile of road or bridge; maintenance of traffic services, signs, markings, etc., are the same. The maintenance of slopes, ditches, shoulders, surfaces on roadway sections, are high whereas bridge decks, bridge rails and bridge drainage items require little, if any, maintenance.

No figures are used here but it is believed quite firmly that annual maintenance costs will be reduced by optimizing on bridge sections rather than earthwork sections.

Our observations of existing cuts in this area, particularly in the disintegrated granite sections, indicate continued falling of material from cuts into drainage ditches and roadway which could increase the cost of roadway and ditch cleaning along this stretch of highway. The observed landslide condition likewise will be increased in earthwork areas. If the landscaping proposed is used on these slopes, maintenance of such planting will be a high-cost item.

While our study line and grade indicates 5,400 linear feet of structures, this is only the first cut of a study. A more careful study with better survey data, geologic and soils data will, I believe, indicate increased economy through the use of a greater amount of such structures rather than a lesser amount. Particular attention should be given to further reducing cribbing and major drainage costs by the use of such structures.

Drainage Considerations

50-year flood criteria was used in determining the runoff for the major drainage structures. Because of the need for preserving existing plant ecology and to avoid excessive scour at outfalls due to over-concentration of drainage channels, relatively wide culvert sections were assumed.

Furthermore, due to the sensitivity of much of the plant life to excessive groundwater, minimal, if any, backwater conditions were permitted and because of the natural condition of tree fall and other wilderness debris conditions, it was

assumed that debris collection at the intake of major drainage structures would not be permitted or desired.

These restrictions would be normal for the park and other wilderness areas and is in line with the recommendations of R.J. Hartesveldt in his report on Atwell Grove and Redwood Creek Grove, dated December 19, 1966.

This would also be in keeping with the California Highway Department Design Manual. While energy dissipators may be required, it is better to reduce the amount and velocity of the runoff concentration than to depend too heavily on such dissipators.

Landscaping

The California State Highway Department expressed a willingness to materially reconstruct on scar areas natural plantings. This effort on their part should be encouraged. However, the art of highway landscaping does not lie primarily in expensive plantings to hide or otherwise "wallpaper" scars. It lies in the selection of location and design criteria which reduces scars and reduces the need for such plantings by leaving much of the original native growth intact.

It is for this reason that the use of structures and cribbing is recommended. Scars will be reduced by at least two-thirds by such techniques. This is particularly essential in these Sierra slopes. The surface cover necessary to support plant life is sparse, natural rainfall during many months is also sparse and retaining the natural vegetation which has conditioned itself to its environmental ecology is very important. It is particularly important here since one of the legislated reasons for this National Park is "to exemplify and maintain for posterity .... all other Sierran vegetation types present in the

parks..."

Some scars will be inevitable due to road construction but rather than exclude the public, it is possible with some care, to reduce the scars, preserve the native growth to a high degree, and still permit the intended transportation use by the public.

For the most part, the structures will be high above vegetation and should be designed to let in the necessary light and rainfall for its preservation. Heights of fifty feet and over, will permit this; however, heights of 15 to 30 feet will generally discourage plant life beneath the structures.

The construction specifications should be so drawn to reduce to a minimum the temporary scars due to construction operations. These restrictions are not abnormal and should be specified and enforced because of the slow rate at which nature will cover such temporary scar conditions.

This is another case where consideration of the amenities and ecology of the area can be done (first instance and ultimate), at a lower cost than solutions not recognizing these public functions and requirements.

Typical Section

I do not suggest a major change in the basic typical sections which are shown in Plate VI. These consist of a 28-foot wide surface on fills, with two to three-foot shoulders for guard rail etc., and for cut sections, 28 feet of pavement plus two twelve-foot shoulders. The bridges proposed are 38 feet out to out and approximately 32 feet roadway width.

I do object to the so-called safety lanes which are added to permit passing at various intervals.

At operating speeds of 40 and 50 miles per hour, neither the State's nor our alignment permits passing safely without these so-called safety lanes, for the 3 1/2 mile test section. At 30 m.p.h., either alignment permits passing sight distances; 15% of the length on the Clarkeson line, and 5% of the length on the California line.

My hesitance in concurring in the safety lanes is due to their location as shown on the site plan and from past experience, my fear that at the end of each safety section, the numbers of vehicles which, when the restriction in width occurs, will be caught overriding the safety lane.

My observations on Route 198 from Visalia to Three Rivers on my visit to the area, confirms my past experience with this type of design. The safety lane design as proposed by California, is, in my opinion, very unsafe and should not be used.

Instead of the so-called safety lanes, it is suggested that periodic and frequent widened shoulders be provided for cars and other vehicles to pull over for scenic purposes and for the purpose of letting any vehicle queues pass

This should be done on both sides of the road since vehicles traveling downgrade may not only wish to enjoy the scenery without crossing the road, but may have to stop to remove tire chains in the winter months. Many such locations should be available and were anticipated in the location studies. They should not be across from one another but staggered.

Regarding the entire design, our information is that the single directional peak hour flow is anticipated at 850 vehicles per hour. This is a very high one-directional load for a two-lane highway and can be handled only with reasonable traffic control. Further, if two-thirds of the 14,000 daily visitors

to the Mineral King area go in and out within one day, this will place a load of 9,400 visitors making the round trip in 2,500 vehicles. To keep the hourly peak to 850 per hour, only one-third of these can leave in any one hour. My own experience in visiting ski resorts in the east (New York and New Hampshire slopes) makes me wonder how much effective control this will require to stagger this load over several hours.

Our vehicle simulation studies indicate that this stretch of road, if designed with the indicated standards of alignment and grade, will effectively operate at 30 to 40 m.p.h. At 40 to 50 m.p.h., there will be insufficient passing opportunity for the faster and more impatient drivers. A restriction to 30 or 35 m.p.h. because of the beauty of the area, should not be onerous at least in daytime for this short length of trip.

There could be of course, considerable said about having the major parking lots at the Three Rivers end of the road just off Route 198. Transportation into the area will be cheaper and, depending upon the size of buses, the traffic load could be reduced to less than 100 vehicles per hour to relieve any operating congestion. Whether or not the capital cost to provide such parking and bussing operations would be less than the cost of garaging in Mineral King, should be studied. The lack of snow at the lower end of the road, and the substitution for passenger and gear handling at Route 198 in place of at Mineral King, may permit substantial savings, not only to the Mineral King visitor, but also to the construction at Mineral King.

Unless some control or other means is considered, this two-lane road does not look at all adequate for a 14,000-a-day visitor load where so many will be one-day visitors.

(*Exhibit Y* duplicates Exhibit K and is *omitted.*)

CECIL F. POOLE
United States Attorney
PAUL E. LOCKE
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450 Golden Gate Avenue
San Francisco, California 94102
Telephone: (415) 556-5134

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, a non-profit California corporation,
Plaintiff,

vs.

WALTER J. HICKEL, individually and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually and as Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,
Defendants.

CIVIL NO. 51464

DEFENDANT'S AFFIDAVIT OF

RICHARD E. DEFFEBACH
DISTRICT ENGINEER, DISTRICT 6
DIVISION OF HIGHWAYS
DEPARTMENT OF PUBLIC WORKS
STATE OF CALIFORNIA

FILED BY DEFENDANTS IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

CECIL F. POOLE
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Telephone: (415) 556-5134
Attorneys for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, a non-profit California corporation, *Plaintiff,* vs. WALTER J. HICKEL, individually and as Secretary of the Interior of the United States, et al., *Defendants.*	CIVIL NO. 51464 **AFFIDAVIT OF RICHARD E. DEFFEBACH**

State of California } ss
County of Sacramento }

I, RICHARD E. DEFFEBACH, the undersigned, being duly sworn, depose and say:

1. That I am now, and have been since July 1, 1966, the District Engineer for District 6 of the Division of Highways, Department of Public Works, State of Califorina, and that said District 6 is the district within which proposed State Highway Route 276 between Three Rivers and Mineral King, California, would be constructed.

2. That as said District Engineer I am responsible for the planning, design, right-of-way acquisition, construction, operation, and maintenance of all state highways within said

District, and that as part of said responsibility I have been since July 1, 1966, in charge of all aspects of the planning and design of said Route 276.

3. That in connection with the construction of the Mineral King recreation project on National Forest land, it is necessary to construct an all-year access highway over lands between State Highway Route 198 from near Three Rivers over to Mineral King, California. That in 1965 the California Legislature added State Highway Route 276 to the State Highway System in order to provide such access.

4. That the California Highway Commission has authorized the construction of such highway, and has approved a program providing funds for right-of-way acquisition and construction. That said Commission has included in its 1969-70 fiscal year budget the sum of 1.8 million dollars for construction of the first unit of this highway project.

5. That the current estimated total cost of said highway project is 25 million dollars, 22 million dollars of which will come from state highway funds and the remaining 3 million dollars of which would come from the Economic Development Administration, an agency of the United States Department of Commerce.

6. That on August 10, 1967, a public hearing was held at Three Rivers, California, by said Division of Highways on the subject of the proposed location of said highway. That on October 24, 1967, the California Highway Commission formally adopted the location of said highway.

7. That said highway, according to said adopted location, would be approximately 20.4 miles long, of which 6.5 miles would traverse Bureau of Land Management lands, 9.2 miles would traverse Sequoia National Park lands, 1.8 miles would traverse Sequoia National Forest lands, and the remaining 2.9 miles would traverse various parcels of private property.

8. That after October 24, 1967, said Division of

Highways commenced the design of said highway. That preliminary plans have been completed for those portions of said highway traversing Bureau of Land Management lands and Sequoia National Forest lands. That preliminary plans for those portions of said highway traversing Sequoia National Park land have not been completed because the National Park Service has not allowed access to said Division of Highways for the carrying out of the seismic investigations necessary to the completion of said preliminary plans. That until a special use permit is issued by the National Park Service for the construction of said highway over Sequoia National Park lands, said Division of Highways will be unable to conduct said seismic investigations and complete said preliminary plans. That as of this date said special use permit has not been issued.

9. That neither said seismic investigations nor any other investigations or actions of said Division of Highways prior to the actual construction of said highway will result in any damage to land or timber growing thereon.

10. That to date said Division of Highways has expended in excess of $600,000 in the planning and design of said highway.

11. That from the date of issuance of said special use permit by the National Park Service, it would take said Division of Highways a minimum of five months to develop preliminary plans for the portion of said highway over Sequoia National Park lands and transmit them to the National Park Service for consideration. That until thereafter there is substantial agreement between said Division of Highways, the National Park Service, the Bureau of Land Management, and the Forest Service on the design of the entire length of said highway, said Division of Highways will not call for construction bids on any portion of said highway.

12. That because of the time necessary to complete design and acquire the necessary rights-of-way and that because the calling for construction bids will not commence until the snow

has melted over the construction area to the point where prospective bidders can examine the construction area, the earliest date for the calling for construction bids on any portion of said highway is approximately May 1, 1970.

13. That the submission of construction bids, award of contract, execution of the necessary contract documents, and mobilization of the contractor's equipment and personnel will require at least two months after said call for bids, so that the earliest date upon which construction of any portion of said highway could commence is approximately July 1, 1970.

14. That the dates set forth in paragraphs 12 and 13 rest upon the assumption that said special use permit from the National Park Service will be issued not later than September 15, 1969. That if the issuance of said special use permit is delayed by order of the court in this action beyond September 15, 1969, the commencement of construction of the first unit of said highway will be delayed a minimum of six months. That any delay in the commencement of said construction will subject said Division of Highways to increases in construction costs at a rate of from three to five percent per annum, and expose said Division of Highways to the risk of losing the said contribution of three million dollars from the Economic Development Administration.

RICHARD E. DEFFEBACH

RICHARD E. DEFFEBACH

Subscribed and sworn to
before me this 24th day
of June, 1969.

ANNA YOUNG

NOTARY PUBLIC
COUNTY OF SACRAMENTO
My commission expires Mar. 4, 1973

CECIL F. POOLE
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Telephone: (415) 556-5134

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, a non-profit California corporation,
Plaintiff,

vs.

WALTER J. HICKEL, individually and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually and as Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,
Defendants.

CIVIL NO. 51464

DEFENDANT'S AFFIDAVIT OF

W. S. DAVIS
ASSISTANT REGIONAL FORESTER
CHIEF OF DIVISION OF RECREATION
CALIFORNIA REGION
FOREST SERVICE
UNITED STATES DEPARTMENT OF AGRICULTURE

FILED BY DEFENDANTS IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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Defendants.

CIVIL NO. 51464

AFFIDAVIT OF W. S. DAVIS

State of California
City and County of San Francisco } ss

I, W. S. DAVIS, being first duly sworn, depose and say:

1. I now am, and have been since 1958, an Assistant Regional Forester for the California Region of the Forest Service, United States Department of Agriculture, and Chief of the Division of Recreation for said California Region. In that capacity I have been since said date and now am the principal adviser of the Regional Forester for said California Region on all recreation matters in said region, including the Mineral King project, which is the subject of this action.

2. I have been intimately involved in all phases of the planning and implementation of the Mineral King project continuously since 1960, and am fully informed as to its current status and as to the future plans of the Forest Service with respect thereto.

3. In February 1965, the Forest Service published a prospectus inviting interested parties to submit proposals for the development of an all-year recreational project in Mineral King Valley, on the Sequoia National Forest, in accordance with certain minimum requirements set forth in said prospectus.

4. Walt Disney Productions (hereinafter referred to as "Disney") and five other bidders submitted proposals in response to said prospectus. After careful study, the Secretary of Agriculture declared the Disney proposal to be the best. Thereafter, on January 10, 1966, a planning special use permit was issued to Disney by the Forest Service for a term of three years in order that Disney might carry out the necessary surveys, investigations, and studies in order to prepare a master plan for development of the project which would meet with Forest Service approval. A true copy thereof is attached hereto as Exhibit A.

5. Disney thereafter carried out such surveys, investigations, and studies, and prepared a master plan, which was duly approved by the Forest Service on January 21, 1969.

6. Said three-year planning permit to Disney provides for the subsequent issuance of a 30-year term permit to Disney upon the meeting of certain requirements, as set forth in Clause 17 of said planning permit, reading as follows:

"17. A 30-year term special use permit covering not to exceed 80 acres, and a supplemental terminable area special use permit, will be issued to the permittee upon the completion of the following requirements.:

(a) Approval by the Regional Forester of plans which meet or exceed the minimum requirements of the

Mineral King prospectus of February 1965, which is on file in the Supervisor's Office.

(b) Award of the first contract within three years of the date of issuance of this permit for improving, to public winter access standard, the authorized State route from the vicinity of Hammond, California, to Mineral King, this contract to cover a significant portion of said road.

(c) Programming of funds for completion of said road to public winter access standards within five years of the award of the first road contract.

The term permit will not be issued unless all three of the above requirements are met.

18. This permit will automatically terminate with the issuance of the permits described in Clause 17, and will in any event terminate three years from the date of issuance."

7. That on or about April 15, 1968, Clause 17(b) of said permit was amended to read as follows:

"Award of the first contract by September 1, 1969, for improving, to public winter access standard, the authorized state route from the vicinity of Hammond, California to Mineral King, this contract to cover a significant portion of said road."

8. That on or about July 3, 1968, Clause 18 of said permit was amended to read as follows:

"This permit will automatically terminate with the issuance of the permits described in Clause 17 (and as amended in Special Use Amendment No. 2, April 15, 1968), and will in any event terminate by September 2, 1969."

9. That on or about June 24, 1969, Clauses 17(b) and 18 were amended to read as follows:

"17(b) Award of the first contract by September 1, 1971, or ninety (90) days after the expiration of any

preliminary injunction ordered by the Court as a result (Sierra Club v. Hickel, et al.), United States District Court, Northern District of California, Civil Action No. 51464, whichever is later for improving to public winter access standards the authorized State route from the vicinity of Hammond, California, to Mineral King, this contract to cover a significant portion of said road.

"18. This permit will automatically terminate with the issuance of the permit described in Clause No. 17 (as amended hereby) and will in any event terminate on September 2, 1971, or ninety (90) days after the expiration of any preliminary injunction ordered by the Court as a result of (Sierra Club v. Hickel, et al.), United States District Court, Northern District of California, Civil Action No. 51464, which ever is later."

10. That I have been advised by the Division of Highways of the State of California that the first contract for construction of a significant portion of the Mineral King Highway will not be let until after May 1, 1970, and shortly before July 1, 1970. Accordingly, pursuant to the terms of the planning permit amended as indicated above, the 30-year term permit to Disney will not be issued by the Forest Service before approximately July 1, 1970.

11. That prior to the issuance of said 30-year term permit, the Forest Service will not permit Disney to commence any construction activities in connection with the Mineral King project, nor will it permit Disney to conduct any activity which would be detrimental to national forest lands and resources.

12. That in connection with the implementation of the Mineral King recreational project, the Forest Service has found it necessary to conduct, is conducting, and must continue to conduct, detailed surveys and studies to determine the basis upon which various aspects of the final construction plans and specifications to be prepared for the Disney project, will be approved. That in conducting these surveys and studies, the Forest Service has not and will not take any actions which will

be detrimental to national forest lands and resources. That if the Forest Service is restrained by preliminary injunction from continuing these surveys and studies, the date of completion of the Mineral King project will be delayed for a period approximately equal to the period during which the Forest Service is restrained from carrying on these surveys and investigations.

13. That in the first year of operation of the Mineral King project, which is now scheduled to open in December 1973, the United States expects to receive from Disney as an annual permit fee a sum estimated to be in excess of $75,000. In the second and succeeding years of operations, the United States expects to receive from Disney as an annual permit fee a sum estimated to be in excess of $100,000. If the completion of the project is delayed by issuance of a preliminary injunction, the United States will be correspondingly delayed in the receipt of said annual fees and will suffer a substantial financial loss to that extent.

14. That the proposed recreational development at Mineral King is not unique in combining a 30-year term permit for an aggregate acreage not to exceed the statutory limitation of eighty acres with terminable permits (for which there is no statutory acreage limitation). There are now in the United States a total of at least 84 recreational developments on national forest lands in which there is such a combination of a 30-year term permit and terminable permits, and at least 15 of these are in the California Region of the Forest Service.

W. S. DAVIS

W. S. DAVIS

Subscribed and sworn to before me
this 25th day of June, 1969.

C. COWNE

Deputy Clerk
United States District Court
Northern District of California

Dept. of Agriculture — Forest Service	NAME OF PERMITTEE	KIND OF USE
SPECIAL USE PERMIT Act of June 4, 1897, or February 15, 1901 This permit is revocable and nontransferable	Walt Disney Productions	Winter Sports (Survey)
	DATE OF PERMIT January 10, 1966	FILE CODE 2710

REGION	STATE	FOREST	RANGER DISTRICT
5	California	Sequoia	Tule River

Permission is hereby granted to Walt Disney Productions, a corporation,

of 500 South Buena Vista Street, Burbank, California,

hereinafter called the permittee, to use subject to the conditions set out below, the following described lands or improvements:

National Forest land at the headwaters of the East Fork of the Kaweah River, commonly known as the Mineral King area, in the Sequoia National Forest (T. 17 S., R. 31 E., MDB&M)

This permit covers (as needed) acres and/or _____ miles and is issued for the purpose of:

Making detailed surveys and plans for the development of a winter and summer recreation development meeting the minimum requirements of the Mineral King Prospectus of February, 1965.

The exercise of any of the privileges granted hereby constitutes acceptance of all the conditions of this permit.

eight hundred thirty-three and 37/100

1. In consideration for this use, the permittee shall pay to the Forest Service, U.S. Department of Agriculture, the sum of Twenty-three thousand Dollars ($ 23,833.37) for the period from February 1, 19 66, to December 31, 19 66, and thereafter annually on January 1

Twenty-five thousand and no/100 Dollars ($ 25,000.00):

This payment is not subject to refund. However, each year $25,000.00 of the annual sum applies on a carry-forward basis as a credit for fees due in future years under the conditions of the term permit if issued as specified in

FS-6 (Rev. 3-63) 17.

EXHIBIT A

2. [redacted] under this permit shall begin within 1 month and shall be completed within [redacted] months, from the date of the permit. The use shall be actually exercised at least [redacted] days each year, unless otherwise authorized in writing.

[redacted] Trees or shrubbery on the permitted area may be removed or destroyed only after the forest officer in charge has approved, and has marked or otherwise designated that which may be removed or destroyed. Timber cut or destroyed will be paid for by the permittee as follows: Merchantable timber at appraised value; young-growth timber below merchantable size at current damage appraisal value; provided that the Forest Service reserves the right to dispose of the merchantable timber to others than the permittee at no stumpage cost to the permittee. [redacted]

4. The permittee shall maintain the improvements and premises to standards of repair, orderliness, neatness, sanitation, and safety acceptable to the forest officer in charge or any approved survey agent.

5. This permit is subject to all valid claims.

6. The permittee, in exercising the privileges granted by this permit, shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations which are applicable to the area or operations covered by this permit.

7. The permittee shall take all reasonable precautions to prevent and suppress forest fires. No material shall be disposed of by burning in open fires during the closed season established by law or regulation without a written permit from the forest officer in charge or his authorized agent.

8. The permittee shall exercise diligence in protecting from damage the land and property of the United States covered by and used in connection with this permit, and shall pay the United States for any damage resulting from negligence or from the violation of the terms of this permit or of any law or regulation applicable to the national forests by the permittee, or by any agents or employees of the permittee acting within the scope of their agency or employment.

9. The permittee shall fully repair all damage, other than ordinary wear and tear, to national forest roads and trails caused by the permittee in the exercise of the privilege granted by this permit.

10. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this agreement or to any benefit that may arise therefrom unless it is made with a corporation for its general benefit.

11. Upon abandonment, termination, revocation, or cancellation of this permit, the permittee shall remove within a reasonable time all structures and improvements except those owned by the United States, and shall restore the site, unless otherwise agreed upon in writing or in this permit. If the permittee fails to remove all such structures or improvements within a reasonable period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and restoration of the site.

12. This permit is not transferable. [redacted]

13. In case of change of address, the permittee shall immediately notify the forest supervisor. [redacted]

14. This permit may be terminated upon breach of any of the conditions herein or at the discretion of the regional forester or the Chief, Forest Service.

15. In the event of any conflict between any of the preceding printed clauses or any provision thereof and any of the following clauses or any provisions thereof, the preceding printed clauses will control.

16. This permit is accepted subject to the conditions set forth above and to conditions 17 to 19, attached hereto and made a part of this permit.

DATE	SIGNATURE OF ADDRESS OFFICER	TITLE
January 10, 1956	[redacted]	Forest Supervisor

[redacted]

17. A 30-year term special use permit covering not to exceed 80 acres, and a supplemental terminable area special use permit, will be issued to the permittee upon the completion of the following requirements:

(a) Approval by the Regional Forester of plans which meet or exceed the minimum requirements of the Mineral King Prospectus of February 1965, which is on file in the Supervisor's Office.

(b) Award of the first contract within three years of the date of issuance of this permit for improving, to public winter access standard, the authorized State route from the vicinity of Hammond, California, to Mineral King, this contract to cover a significant portion of said road.

(c) Programing of funds for completion of said road to public winter access standards within five years of the award of the first road contract.

The term permit will not be issued unless all three of the above requirements are met.

18. This permit will automatically terminate with the issuance of the permits described in Clause 17, and will in any event terminate three years from the date of issuance.

19. This permit shall have no force or effect until it has been signed by the permittee and the Forest Service.

WALT DISNEY PRODUCTIONS, a CORPORATION

Jan H. LL
Date

By Walt Disney
President

[Corporate Seal]

ATTEST:
Luther K. Man
Secretary

I, Luther R. Mann, certify that I am the _____ Secretary of the Corporation that executed the above permit; that Roy D. Chapin, who signed said permit on behalf of said corporation, was then President of said corporation; that I know his signature, and that his signature on said permit is genuine; and that said permit was duly signed, sealed, and attested to for and on behalf of said corporation by authority of its governing body.

[CORPORATE SEAL]

Luther R. Mann
Secretary

CECIL F. POOLE
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PAUL E. LOCKE
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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERNDISTRICT OF CALIFORNIA

SIERRA CLUB, a non-profit California corporation,
Plaintiff,

vs.

WALTER J. HICKEL, individually and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually and as Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,
Defendants.

CIVIL NO. 51464

DEFENDANT'S AFFIDAVIT OF

DONN B. TATUM
PRESIDENT
WALT DISNEY PRODUCTIONS

FILED BY DEFENDANTS IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

CECIL F. POOLE
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Attorneys for Defendants

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, a non-profit California corporation, *Plaintiff,* vs. WALTER J. HICKEL, individually and as Secretary of the Interior of the United States, et al., *Defendants.*	CIVIL NO. 51464 **AFFIDAVIT OF DONN B. TATUM**

State of California }
County of Los Angeles } ss

I, DONN B. TATUM, being duly sworn, depose and say:

1. I am President of Walt Disney Productions, a California corporation (hereinafter called "Disney"). Since February, 1965, when the United States Forest Service issued a prospectus inviting bids for the development of an all-year recreational area at Mineral King in the Sequoia National Forest, I have served Disney in the capacities of Vice President and Administrative Assistant to the President, Executive Vice President-Administration and President. Throughout this time I have

worked closely with the members of our staff in the development of our initial proposal and subsequent master plan and in the administration of this project. In performing these duties, I have gained a thorough knowledge of the Mineral King project.

2. In March, 1965, Disney received from the United States Forest Service a publicly announced prospectus, inviting interested persons to bid for the development of an all-year recreational facility at Mineral King in the High Sierra. Disney responded to this prospectus by initiating research and planning efforts leading to the submission of a proposal to the Forest Service on August 31, 1965. Five other organizations submitted proposals.

3. In preparing its preliminary proposal for presentation on August 31, 1965, Disney initiated extensive studies of the development site, surveyed existing research data on the area, and contracted for extensive additional studies from outside consultants.

4. On January 10, 1966, Secretary of Agriculture Orville Freeman announced that Disney was the successful applicant, and the United States Forest Service granted a three-year preliminary planning permit, which has since been extended. The permit specified the planning period as a time to: 1) obtain commitments for construction of an all-year access road to Mineral King; 2) make on-site studies; and 3) further refine and obtain approval of the developmental master plan.

5. During the term of the three-year preliminary planning permit, Disney initiated additional detailed studies and surveys leading to the preparation of its master plan for the development. A Disney snow survey team has lived at Mineral King during each winter season since 1966 observing snow conditions, recording temperatures, wind conditions, stream flow, snow depths, snowfall and snow drifting patterns, and mapping avalanche activity.

6. Disney has also obtained from highly respected

independent consultants and planners: reports on ski area and resort planning; low and high altitude vertical photography and topographic mapping of Mineral King; detailed data on various rock and soil types, and geological conditions in the Village and proposed parking area; studies on sanitation, waste disposal, water systems, meteorology and avalanche control; studies on transportation systems to bar automobile traffic from the Mineral King Valley; and other substantial research and planning reports.

7. All of the information obtained through such continuing studies was then analyzed by the architectural and engineering staff of Disney's subsidiary, WED Enterprises, Inc., in Glendale, California. WED Enterprises expended substantial sums of money in the further development of the master plan for this project.

8. The master plan was submitted to the United States Forest Service for final approval on January 8, 1969. Notification of formal approval of this master plan was received by Walt Disney Productions on January 21, 1969, and announced by the United States Forest Service at press conferences in Los Angeles and San Francisco on January 27, 1969. From January 10th, 1966, through the time of approval of the master plan and up to the present date, Disney's planning has been performed under the constant supervision and review of officials of the United States Forest Service.

9. Under the supervision of the United States Forest Service, continuing studies will be carried out up to and during the construction phase of this project, in order further to enhance Disney's ability to serve the public need through this development.

10. In connection with the preparation of the master plan Disney has incurred in excess of three quarters of a million dollars in direct costs for necessary research and creative efforts.

11. Disney has met all of its obligations under the terms of

the preliminary planning permit granted January 10, 1966, as amended.

12. Upon final approval of the necessary right-of-way, and award by the State of California Department of Public Works of the first construction contract for a significant portion of the access road from Hammond, California, to Mineral King, the Forest Service has agreed to grant a thirty-year term permit, under which Disney will construct the permanent facilities related to this development. I am informed that construction under such contract will not commence before July 1, 1970.

13. As Disney has met all of its obligations under the terms of the preliminary planning permit now in effect, it does not intend to initiate substantial additional on-site activities until after it has been awarded the thirty-year term permit.

14. The facilities to be constructed by Disney are planned for completion contemporaneously with the completion of construction for the new all-weather access road. As currently programmed, this road is planned for completion by October, 1973. Therefore, Disney now contemplates that its construction program will be begun during the summer season of 1971 and will grow to peak activity during the summers of 1972 and 1973. In any case, no activity is contemplated by Disney which would result in any alteration whatsoever of the natural character of Mineral King until the summer of 1971, two years hence.

15. The preliminary injunction being sought in this action would injure Disney in the following manner:

a) Such an injunction would prevent the responsible Federal and State authorities from completing the administrative planning, review and action necessary to prepare for and let the first contract for construction of the all-weather access road. These steps include approval by the National Park Service of the necessary right-of-way agreement for that portion of the access road which crosses Sequoia National Park; approval of similar right-of-way agreements for those portions of the road which cross lands administered by the Bureau of Land Management

and the United States Forest Service; acquisition by the State of California of various parcels of private property affected by the proposed access route; completion by the State of California of necessary design work; and preparation of the specifications for the initial construction contract and letting said contract. These administrative actions, which will in no way alter the character of the landscape in the Sequoia National Park or the Sequoia National Forest, must be completed before Disney is granted its thirty-year term permit.

b) Disney intends continuously to review and improve the master plan for the development of Mineral King up to and through the construction period. The injunction sought would prevent any government officials from consulting with Disney or reviewing and commenting on Disney's proposals for improvement of the master plan, thus effectively preventing Disney from refining and improving plans for the Mineral King development.

c) Delay resulting from an injunction could force Disney to defer its schedule for constructing this badly needed recreational facility, resulting in substantial financial injury to Disney through additional administrative expenses, increased construction costs, reprogramming of personnel requirements and disruption of corporate financial affairs.

DONN B. TATUM

DONN B. TATUM

Subscribed and sworn to
before me this 26th day
of June, 1969.

DIANE USHER

OFFICIAL SEAL
DIANE USHER
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires July 10, 1970

CECIL F. POOLE
United States Attorney
PAUL E. LOCKE
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Attorneys for Defendants

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IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

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Plaintiff,

vs.

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Defendants.

CIVIL NO. 51464

DEFENDANT'S AFFIDAVIT OF

JOHN S. McLAUGHLIN
SUPERINTENDENT OF SEQUOIA NATIONAL PARK
NATIONAL PARK SERVICE
UNITED STATES DEPARTMENT OF INTERIOR

FILED BY DEFENDANTS IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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Plaintiff,

vs.

WALTER J. HICKEL,

Defendants.

CIVIL NO. 51464

AFFIDAVIT OF JOHN S. McLAUGHLIN

State of California
City and
County of San Francisco } ss

I, JOHN S. McLAUGHLIN, being duly sworn, depose and say:

1. That I am now and have been since October 1967 the Superintendent of Sequoia and Kings Canyon National Parks, National Park Service, United States Department of Interior.

2. That in my capacity as Superintendent of said National Parks I am familiar with the proposed Mineral King recreational development.

3. That in connection with the said development, it is planned that an all-year access highway over 9.2 miles of the land in the Sequoia National Park will be constructed and maintained by the Division of Highways, Department of Public

Works, State of California.

4. That the Secretary of Interior on November 19, 1968, approved the construction of said two-lane all-year access road through the Sequoia National Park, subject to precise on-the-ground location and construction standards that will protect the National Park values.

5. That the general plans and design approved for the construction of the two-lane all-year access road will be engineered so that there will be a minimum impact on the National Park values. The alignment of the road will be carefully selected to protect the Sequoia trees, natural areas, existing drainage ways, and the over-all ecology of the area.

6. In connection with said proposed construction, a permit, which will insure maximum protection of National Park values, is proposed to be issued to the State of California to provide the necessary rights of way for said construction.

7. That preliminary work incident to the further planning of said road and prior to the commencement of actual road construction will result in only minimal disturbances of the terrain and forest cover in Sequoia National Park.

JOHN S. McLAUGHLIN

JOHN S. McLAUGHLIN

Subscribed and sworn to before me
this 27th day of June, 1969.

C. COWNE

Deputy Clerk
United States District Court
Northern District of California

FELDMAN, WALDMAN & KLINE
LEO E. BORREGARD
LELAND R. SELNA, JR.
MATTHEW P. MITCHELL
2700 Russ Building
San Francisco, California 94104
Telephone: 981-1300

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, a non-profit California corporation,
Plaintiff,

vs.

WALTER J. HICKEL, et al.,
Defendants.

CIVIL ACTION

51464

AFFIDAVIT OF MATTHEW P. MITCHELL IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

MATTHEW P. MITCHELL, being duly sworn, deposes and says:

1. I am an attorney admitted to practice before the above Court, and one of the attorneys for plaintiffs in this suit.

2. On June 24, 1969, I met with Rodney Hamblin, an attorney in the United States Attorney's office in this District, in connection with this suit. I asked Mr. Hamblin for assurance that permits to Walt Disney Productions, Inc. for a development in the Mineral King Valley and to the Division of Highways of the State of California for the construction of a road through

Sequoia National Park would not be issued pending resolution of plaintiff's motion for a preliminary injunction herein. He stated that he could not give such assurance.

3. During the course of that conversation, Mr. Hamblin stated, *inter alia* that he had been asked by the defendants herein whether to proceed with their plans and issuance of permits for the Mineral King development and the Sequoia Park road, shortly after they had been served with process in this suit. He said that he had advised that since there was no preliminary injunction or temporary restraining order in effect, the defendants could proceed on a "businss as usual" basis.

4. During the course of my conversation with Mr. Hamblin, we went from the corridor of the Federal Building to Mr. Hamblin's office, where he placed several telephone calls to determine the status of the permits in question. I heard only his side of the conversations during the calls, but he informed me of their content in substance as follows:

(a) That a permit for the road through Sequoia Park, apparently in "final form" was on the desk of a Mr. Bowen of the National Park Service, and that it had been contemplated that a Mr. Hartzog, head of the National Park Service would come to California on that day (June 24) to work out certain final details with the California Division of Highways, and that when those details were settled, the permit would be signed;

(b) That Mr. Hartzog had postponed his trip and would apparently not be coming to California to finalize the permit until after the weekend of July 4, 1969, but he did not know Mr. Hartzog's plans.

5. I have never seen a copy of the permit proposed to be issued to the California Division of Highways by Secretary Hickel or his agents and to my knowledge no attorney for the Sierra Club and no official of the Sierra Club has seen a copy of that permit. I understand it to be an unconditional permit

purporting to authorize construction of a road across Sequoia National Park.

DATED: June 30, 1969.

MATTHEW P. MITCHELL
MATTHEW P. MITCHELL

Subscribed and sworn to before me
this 30th day of June, 1969.

HALLIE KELLER
NOTARY PUBLIC IN AND FOR
THE STATE OF CALIFORNIA
My Commission Expires Nov 17, 1969

United States District Court
Northern District of California

No. 51,464

Sierra Club, a non-profit California corporation,
Plaintiff,
vs.
Walter J. Hickel, et al.,
Defendants.

MEMORANDUM OF DECISION

SWEIGERT, J.

The Forest Service, Department of Agriculture intends to issue certain permits to Walt Disney Productions, Inc., a private corporation, for the construction and maintenance of a private hotel-resort, winter-summer complex in the Sequoia National Forest known as Mineral King.

The permits will cover in excess of 1,000 acres of land and, according to plaintiff, will ultimately affect as much as 13,000 acres. It is estimated that the project will involve as high as 35 million dollars of private investment.

Mineral King, since 1926, has been, not only a national forest under the jurisdiction of the Forest Service, Department of Agriculture, but also a national game refuge by special designation of the Congress (26 Stat. Chap. 744).

The permits are to be issued as soon as construction contracts are executed by the State of California for the construction of a substantial segment of a proposed public highway through the adjoining Sequoia National Park which is under the jurisdiction of the National Park Service, Department of the Interior.

The National Park Service intends to issue to the Division of Highways, State of California, a permit for the construction of a new all-weather, high-speed highway, estimated to accommodate 1200 vehicles per hour each way, through the Sequoia National Park as the most economically feasible means of providing motorist highway connection between the California highway system and the proposed Mineral King hotel-resort project which is located, not within the national park, *but* in the adjoining national forest game refuge.

The case is presently before the court on plaintiff's application for a preliminary injunction restraining the defendant federal agencies from issuing the permits in question.

The Forest Service Permits for the Resort-Hotel Project

The permits about to be issued by the Forest Service will, in effect, enable the Developer to construct and maintain a winter-summer, hotel-resort project which, including its "elbow room" for related facilities, will comprise admittedly over 1,000 acres and, as claimed by petitioner, may affect 13,000 acres of forest-game refuge land.

This is to be accomplished by the device of using two kinds of permits: (1) a 30 year-80 acre "term" permit for "most of the major facilities," and (2) a separate

so-called "revocable" permit covering an additional 1,000 acres for "other major facilities, e.g., ski lifts, towers, refuse and sewer disposal, parking areas and roads" for use in conjunction with the resort covered by the 30 year-80 acre term permit.

Title 16 U.S.C. § 497 provides, as far as applicable here, that the Secretary of Agriculture is authorized "to permit the use and occupancy of suitable areas of land within the national forest, *not exceeding 80 acres,* and for periods not exceeding 30 years, for the purpose of constructing or maintaining hotels, resorts or other structures or facilities necessary or desirable for recreation, public convenience and safety." (emphasis added)

The section makes similar provision for industrial and commercial purposes related to or consistent with other national forest uses; also similar provisions for state agency public uses; also similar provision for summer homes and stores, except that in this latter case the acreage limitation is 5 acres.

The legislative history of Section 497, first adopted in 1915, amended in 1948 and broadened to its present form in 1956, indicates quite clearly that, although its purpose has been to grant the Secretary of Agriculture power to issue *term* permits for certain kinds of specified uses, its purpose has been also, and equally important, to restrict term permits for those uses *timewise,* i.e., 30 years for any use, and *areawise* to 5 acres for summer homes and stores, and (since 1956) 80 acres for the uses specified in the kind of usage here involved, i.e., hotels, resorts and other structures or facilities necessary or desirable for recreation, public convenience or safety.

It is also clear from the legislative history that the 80 acre limitation on hotels and resorts was intended to include, not only the resort or hotel, itself, but also any and all structures or facilities related to it, e.g., "elbow room" for ski lifts and other related service facilities. See, *1948 U.S. Code Cong. & Ad. News,* pp. 1337-1338; *1956 U.S. Code Cong. & Ad. News,* pp. 3334-3336.*

It is also clear from the legislative history that in 1948 Congress refused to broaden (except for Alaska), the pre-existing 5 acre limitation for any permit for any purpose and did *not,* in fact, enlarge the acreage provision from 5 to 80 acres with respect to resort-hotel use of forest land in the United States until 1956 upon the representation that the requirements of commerce, industry, recreation and public use of space in the national forests had substantially changed. (See, 1958 U.S. Code Cong. & Ad. News, p. 3336).

It is also clear from the legislative history that in 1956 the Secretary represented to the Congress that his authority to issue "revocable" permits was adequate only "for uses for which long term tenure is unnecessary or *undesirable.*" (U. S. Code Cong. & Ad. News, p. 3636).

The question arises whether this dual permit device is intended to circumvent the clear 80 acre limitation of Section 497 and thereby accomplish what would be in effect a violation of the section.

It will be noted that Section 497, which imposes the 80 acre limitation, does not differentiate between different

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*See Defendants' Responding Brief of 7/14/69, attachment No. 1 at p. 3, Letter of 8/5/55, Acting Secretary of Agriculture to Chairman, Senate Committee on Agriculture and Forestry.

kinds of permits. It broadly refers to any "permit" for the specified uses.

So far as so-called "revocable" permits are concerned, Congress has never expressly authorized them. Agriculture claims authorization for them only under its general power to so regulate the forest lands as "to preserve the forests thereon from destruction" (16 U.S.C. § 551) and under an Attorney General's Opinion of 1928. (35 Op. A.G. 485 [11/27/28]).

That opinion, while recognizing an implied power to issue them, narrowly restrict their use to situations in which such a permit is (1) made expressly revocable at will by its terms, and (2) the permitted structures are capable of being removed in case of revocation, and (3) the permitted use will not permanently damage or destroy the land for government use, and (4) the permitted use will be of direct benefit to the United States.

It is questionable whether the so-called "revocable" permits to be used by Agriculture in the present case meet the strict standards prescribed by the Attorney General.

In the first place they are not by their terms expressly made terminable "at will." Clause 15 merely provides that "This permit may be terminated upon breach of any of the conditions herein *or at the discretion* of the Regional Forester or the Chief of the Forest Service." (emphasis added)

Any such revocation is made subject to administrative appeal under Agriculture's own regulations. (36 CFR 211.20-211.119). Also, the Forest Service Manual (FSM

2711.2-5; 10/68), while stating that these permits are "generally for use of short duration," adds that "They will be limited to the time actually needed for exercising the use privileges."

These provisions strongly suggest to the Developer that the so-called "revocable" permit is not really revocable "at will" and that any discretionary revocation thereof must be reasonable in the light of all the circumstances, including the time actually needed for exercising the use privileges covered thereby—use privileges which in the present case are so coupled with the 30 year term permit that the time actually needed for exercising them would obviously be at least 30 years.

Clause 11 provides that "Upon abandonment, termination or revocation or cancellation of this permit the permittee shall remove within a reasonable time all structures and improvements . . . and shall restore the site unless otherwise agreed upon in writing or in this permit. . . ." There is no requirement that the structures shall in fact be capable of such removal or that the use will not be in fact such as to permanently destroy or damage the land for government use.

Further, the uses granted to the Developer by the two purportedly separate permits admittedly relate to a single, unified project and are obviously interlocked and interrelated.

It is inconceivable that Agriculture would, or could under the terms of the "revocable" permit and the circumstances of its issuance, suddenly and "at will" require the Developer to remove ski lifts, towers, refuse and

sewage disposal, parking areas and roads covered by that permit and thus effectively destroy the 35 million dollar investment made by the Developer under his 30 year-80 acre term permit.

The very opinion of the Attorney General relied on by Agriculture warns of just such a possible danger to the public interest in granting revocable permits, saying: "In cases where it appears that the permittee intends to make substantial improvements the removal of which would cause him a great loss in case of revocation of the permit, it is a matter of departmental policy whether a situation should be created by the issue of a permit which may afterwards embarrass the head of the department in the exercise of the powers of revocation."

For the foregoing reasons we conclude that the proposal of Agriculture in the pending case, if carried out, may involve a violation not only of the letter, but also the purpose and intent of Section 497 so far as its 80 acre limitation is concerned.

To hold otherwise would be to assume that the Congress when enacting and amending this acreage limitation, contemplated that it could be circumvented, even nullified, by the device of coupling two different kinds of permits for a single, unified, private hotel-resort development, occupying more than 1,000 acres of a forest game refuge area. If Congress had any such situation in mind, it could have spared itself time and trouble by omitting any area limitation—or by otherwise indicating its intent. Certainly Congress could not have been so naive as to think that "revocable" permits, issued under such circumstances, would *really* be revocable.

National Park Service—Permit for the Highway

Interior proposes to issue to the Division of Highways, State of California, a permit for the construction of a highway *through* the National Park to connect the California Highway system with the Mineral King development, which is located, not within the Park, but outside of it in the national forest game refuge area.

Interior is entrusted with administration of the national park system by such means and measures as conform to the fundamental purpose of said parks, i.e., to conserve the scenery and the natural and historic objects and wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations (16 U.S.C. § 1) and, specifically, as to Sequoia National Park, for the preservation from injury of all timber, mineral deposits, natural curiosities and wonders and their retention in their natural condition. 16 U.S.C. § 43.

There can be no doubt that Interior has the power to construct and improve roads and trails in the national parks (16 U.S.C. § 8) and that, the wide discretion of Interior in that respect should not ordinarily be interfered with.

It appears, however, that in May, 1968, Interior adopted certain Park Road Standards providing that park roads are *not* continuations of state and federal highway network; that they should not be designed to serve as connecting links for routing motorists through the parks to reach ultimate destinations or simply as a connecting device to link points of interest and, further, that a professional ecological determination must precede approval of road construction and design to make sure that

resulting effects on wildlife, drainage, stream flow and climate will be minimal.

Plaintiffs also cite a 1962 House Committee Report of the Congressional Committee of Interior and Insular Affairs (dealing with the Padre Island National Seashore) stating that construction therein of a through highway for general public convenience would give that project a function which does not belong to it and that such a roadway might spoil its very purpose.

In the present case the record shows that the proposed highway, so far as it will cut through Sequoia National Park, is designed and intended, not as an adjunct to the National Park, itself, but as a connecting link to route motorists through the Park to reach an ultimate destination outside the Park—the proposed, private Mineral King resort-hotel complex in the adjoining forest game refuge area.

Thus, the question arises whether the particular highway here in question is fairly within the power of Interior as interpreted by its own standards.

National Park Service—The Transmission Line

It further appears from the record that Interior proposes to permit construction of a 66,000 volt power line across the National Park in order to enable the Developer to obtain necessary electric power for the project.

Title 16 U.S.C. § 45(c), which applies specifically to Sequoia National Park, provides that no permit for transmission lines or for the transmission of power within the Park limits shall be granted or made *without specific authority of Congress.*

Interior contends that this statute was intended to apply only to the construction and development of hydro-electro projects within the Park and does not preclude him from granting rights-of-way across park lands for transmission lines under the general power granted Interior by Title 16 U.S.C. § 5 to grant rights-of-way across public lands of the United States for electrical poles and lines for the transmission of electric power, provided that such right-of-way shall be allowed within or through any national park only upon approval of the chief officer of the department and upon a *finding* that the same is not incompatible with the public interest.

It will be noted, however, that this latter section is a general statute while Section 45(c), deals specifically with Sequoia National Park and, without making any distinction between electric projects within or without the Park, clearly provides that, so far as that Park is concerned, there shall be no permit for any transmission line or for the transmission of power within the Park limits without specific Congressional authority.

Thus, there arises the further question concerning the power of Interior to permit the transmission line—absent specific authority from Congress.

Failure to Hold Public Hearings

Plaintiff contends that no public hearings were ever held by either the Forestry Service with respect to the Mineral King Development or by Interior with respect to the highway or transmission line.

It appears from the record that in March, 1953, Congressman Hagan conducted a hearing at Visalia to determine what could be done to expedite development

of Mineral King. There is, however, no record of any public hearing called or conducted by either the Forestry Service or by Interior.

Whether Forestry Service was required by law to hold such hearings is not clear.

As to Interior, however, plaintiffs contend that it has violated its own rule (34 Fed. Reg. 19 [1/29/69]), calling for both corridor and design public hearings with respect to any major road project that would have a substantial social, economic or environmental effect.

Plaintiff contends that a purported "revocation" of that rule by the new Secretary on April 26, 1969 (34 Fed. Reg. 6985)[1] was ineffective because there was no compliance by the Secretary with the Administrative Procedure Act (5 U.S.C. § 553(b)(c)), providing for publication of general notice of proposed rule making in the Federal Register (553(b)) and opportunity for interested persons to participate in the rule making (553(c)).

"Rule making" is defined by the Administrative Procedure Act (5 U.S.C. § 551(5)) to include, not only the formulation or amendment of rules, but also the "repealing" of rules.

Interior contends that the requirements of 5 U.S.C. § 553(b)(c) are not applicable to rule making on "a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts" (see, Sec. 553(a)(2)), or to "interpretive rules, general statements of policy or rules of agency organization, procedure or practice." (See, Sec. 553(b)(a)).

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[1]A press release of April 26, 1969 states that the reason for this purported revocation was to provide *even broader public review* and comment—not just on road building, but on all phases of the national park system.

Thus, there is presented the further question whether repeal, without general notice, of the pre-existing rule calling for public hearing concerning major road projects having substantial, social, economic or environmental effects, is a mere rule of procedure, practice or policy and, if not, whether Interior was required by its own rule to conduct public hearings on the highway in question.

Plaintiff's Standing to Sue

Defendants contend that plaintiffs have no standing to sue because they have nothing more than a general interest in common with all citizens and cannot show that any private, substantive legally protected interest of theirs is being directly invaded within the meaning of such cases as *Associated v. Ickes,* 134 F.2d 694 (C.A. 2d 1943); *Anti-Facist v. McGrath,* 341 U.S. 123, 140-41, 151-52 (1951); *Perkins v. Lukins,* 310 U.S. 113, 125 (1940); *Associated v. Camp,* 406 F.2d 837, 838 (8th Cir. 1969).

We are of the opinion, however, that plaintiff, Sierra Club, a non-profit California corporation, organized and existing for the purposes described in its complaint (Par. 3), may be held to be sufficiently aggrieved to have standing as a plaintiff herein. See, *Scenic v. FPC,* 354 F.2d 619 (2d Cir. 1965); *United Church v. FCC,* 359 F.2d 994 (D.C. 1966); *Road League v. Boyd,* 270 F.Supp. 650, 661 (N.Y. 1968); *Powelton v. HUD,* 284 F.Supp. 809, 825-828 (Pa. 1968).

Propriety of Preliminary Injunction

Defendants rest largely on the argument that there is no such urgency as would justify a preliminary injunction at this time.

It appears from the record that the National Park Service permit for construction of the highway by the State of California is ready for issuance at any time and, when issued, will authorize the State of California to proceed at any time thereafter with highway construction.

Affidavits presented on behalf of defendants indicate that the State of California will not actually be in a position to take bids for the highway construction until May 1, 1970 and that actual highway construction can not actually begin until July 1, 1970.

It appears, however, that as soon as Interior grants the highway permit, the State of California, which is not a party to this action and, therefore, not amenable to orders of this court, will be in a position to control the time within which highway construction contracts will be let and thus in effect determine the time when Agriculture must issue its permits to the Developer for construction of the Mineral King project.

In view of the possibility that Interior may issue the highway permit at any time, thereby substantially changing the existing situation and setting events in motion, plaintiff should not be left to "watchful waiting" upon the State of California. We find, therefore, that there is a sufficient showing of imminent and irreparable injury to require pendente lite relief.

Conclusion

It is true that the scope of judicial review over officials to whom Congress has entrusted the control and management of public lands is a particularly narrow one in which

there is, perhaps, less reason for interference with administrative discretion than in any other kind of administrative action. *Ickes v. Underwood,* 141 F.2d 546, 548 (C.A. D.C. 1944).

Nevertheless, we find that plaintiff has raised questions, concerning possible excess of statutory authority, sufficiently substantial and serious to justify a preliminary injunction against both Agriculture and Interior pending trial of these issues on the merits or the further order of this court.

It is beside the point to argue, as do defendants, that a preliminary injunction in this case would interfere with progress by raising doubts about the validity of similar arrangements made with respect to 84 other recreation areas, including 5 in California.

This court is not concerned with the controversy between so-called progressives and so-called conservationists. Our only function is to make sure that administrative action, even when taken in the name of progress, conforms to the letter and intent of the law as laid down by Congress and which only the Congress can change whenever it finds such change to be in the public interest.

Plaintiffs' motion for preliminary injunction is granted.

Dated: July 23rd, 1969.

W. T. Sweigert,
United States District Judge

Filed July 23, 1969,
Clerk, U.S. Dist. Court, San Francisco.

FILED
AUG-4 1969
C. C. EVENSEN, Clerk

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, a non-profit California corporation, *Plaintiff,* vs. WALTER J. HICKEL, individually and as Secretary of the Interior of the United States, et al., *Defendants.*	CIVIL NO. 51464 **PRELIMINARY INJUNCTION**

This cause coming on to be heard on the motion of plaintiff for a preliminary injunction and the Court having considered the verified complaint, the affidavits submitted in support of and in opposition to said motion and the arguments of counsel and being fully advised of the premises and; (a) it appearing to the Court that the defendants named, and each of them, threaten to commit the acts complained of and hereinafter set forth as enjoined hereby; and (b) that unless said acts are enjoined, irreparable injury may result to plaintiff; and (c) that the pendancy of a preliminary injunction is not likely at this time to produce costs or damages to defendants, or any of them; and good cause appearing therefor,

NOW, THEREFORE, PENDING FURTHER ORDER OF THIS COURT, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Defendants CLIFFORD M. HARDIN, J. W. DEINEMA and M. R. JAMES, and each of them, individually and in their respective official capacities, and their respective agents, serv-

ants, employees and attorneys and all persons in active concert and participation with them be and they hereby are restrained and enjoined from doing any of the following acts: from granting any permits, rights-of-way or approvals with respect to the Mineral King development plan of Walt Disney Productions, Inc., approved by the Secretary of Agriculture on January 21, 1969, or of any other development of like or similar nature, the effect of which grant would be to authorize construction or any other physical interference with, or disturbance of, the terrain within the Sequoia National Game Refuge, including all physical features located thereon; provided, however, that this shall not be deemed to preclude the conduct of investigations, planning, surveys and exploration in connection with the design of said development which do not interfere with the said terrain or physical features or the issuance of any permits, rights-of-way or approvals incident thereto.

2. Defendants WALTER J. HICKEL and JOHN S. McLAUGHLIN, and each of them, individually and in their respective official capacities, and their respective agents, servants, employees and attorneys and all persons in active concert and participation with them be and hereby are restrained and enjoined from doing any of the following acts: from granting any permits, rights-of-way or approvals with respect to the approximately 9.2 mile highway which is more particularly identified in plaintiff's Second Claim for Relief, proposed to cross the Sequoia National Park to the site of the Mineral King development of Walt Disney Productions, Inc., or of any other highway of like or similar nature the effect of which grant would be to authorize construction or any other physical interference with, or disturbance of, the terrain of Sequoia National Park, including all physical features located therein; provided, however, that this shall not be deemed to preclude investigations, planning, surveys and exploration in connection with the design of said highway which do not interfere with the terrain or the physical features located thereon or of the issuance of permits, rights-of-way or approvals incident thereto.

3. That, for the present, no bond is required in connection with this injunction, the Court specifically reserving the right to review at any time the likelihood that the continued pendancy of this injunction would be the cause of damage to defendants and the right to require that a bond be furnished as a condition to the continued existence of the order at such time as such damage would appear likely.

4. That the defendants shall have ten (10) days within which to file an answer to the allegations of the complaint from the date hereof.

Dated: August 4th, 1969

W. T. SWEIGERT
Judge, United States District Court
Northern District of California

FILED
AUG 12 1969
C. C. EVENSEN, Clerk

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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB, a non-profit California corporation,
Plaintiff,

vs.

WALTER J. HICKEL, individually and as Secretary of the Interior of the United States, et al.,
Defendants.

CIVIL NO.
51464

JOINT ANSWER

COME NOW the defendants, and each of them, and file this Joint Answer to the Complaint herein, insofar as they or any of them are required to answer.

I

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint, except that defendants admit that plaintiff is a non-profit corporation organized and operating under the laws of the State of California.

II

Defendants admit the allegations contained in Paragraph 4 of the Complaint, except that the correct name of the Federal Agency in charge of the Sequoia National Forest is the Forest Service and not the National Forest Service as referred to in Sub-Paragraphs (c) and (e) thereof.

III

Defendants admit the allegations contained in Paragraphs 5 and 6 of the Complaint.

IV

Defendants admit the allegation in the first sentence of Paragraph 7 of the Complaint and admit the allegations in Sub-Paragraph (c) thereof except that the estimates referred to therein are peak figures of the respective alleged uses and not average hourly or daily estimates of said uses; deny that the facilities referred to in Sub-Paragraph (a) thereof will occupy an area in excess of 80 acres; and deny the allegations in Sub-Paragraph (b) thereof.

V

Defendants deny the allegations contained in the first complete sentence of Paragraph 8 of the Complaint but admit the remaining allegations contained in said Paragraph 8.

VI

With respect to Paragraphs 1, 2, 9, 10 and 11 of the Complaint, defendants deny each and every allegation contained in said paragraphs.

VII

The allegation contained in Paragraph 12 of the Complaint is a conclusion of law and requires no answer.

VIII

Answering Paragraph 13 of the Complaint, defendants replead, reallege, and incorporate herein each and every admission, denial and allegation contained in Paragraphs I through VI

above, and by reference include the same as if herein pleaded in full.

IX

Defendants admit the allegations contained in Paragraph 14 of the Complaint, except that defendants admit that the length of the road is only substantially correct.

X

Defendants admit the allegations contained in Paragraph 15 of the Complaint but deny that the State of California will immediately let contracts for the commencement of construction.

XI

With respect to Paragraphs 16, 17, 18, and 19 of the Complaint, defendants deny each and every allegation contained in said paragraphs.

XII

The allegation contained in Paragraph 20 of the Complaint is a conclusion of law and required no answer.

AFFIRMATIVE DEFENSES

As affirmative defenses to the Complaint herein, defendants allege as follows:

XIII

The Complaint, including each of the separate claims thereof, fails to state a claim or claims upon which relief can be granted.

XIV

The plaintiff does not have standing to bring this action.

XV

The Court lacks jurisdiction over defendants, and each of them, and over the subject matter of the Complaint, including each of the claims thereof.

XVI

The Court lacks jurisdiction of this suit in that there is no controversy in this matter which exceeds the sum of $10,000, and the Complaint does not set forth any facts to warrant the conclusion that there is such amount involved.

XVII

Plaintiff's Complaint is in reality a suit against the United States, in which the United States has not consented to be sued and plaintiff is therefore barred from bringing this action.

XVIII

Plaintiff is not entitled to maintain this suit by reason of laches since plaintiff had notice on or before May 1, 1965, of the proposed recreation development at Mineral King in Sequoia National Forest to be sponsored by the Forest Service, U. S. Department of Agriculture, and was aware of the contents of the prospectus issued by the Forest Service in February 1965, which prospectus contained all fundamental standards and proposed permits to be issued and actions to be taken by defendants in connection with said recreation development, and plaintiff made no attempt to obtain judicial determination of its alleged rights until more than four years after having knowledge of said proposed development. That in absence of plaintiff's effort to obtain prompt judicial relief of its alleged rights, defendants in their official capacities have expended large sums of money in planning and investigation in connection with the proposed recreation development. Plaintiff has thereby been guilty of such laches as should in equity bar plaintiff from maintaining this action.

WHEREFORE, defendants pray:

1. That plaintiff take nothing by its Complaint herein;

2. That all specific relief against defendants or any of them be denied;

3. That all orders for relief pendente lite be dissolved;

4. That judgment be entered in favor of defendants and each of them against plaintiff;

5. That defendants may have judgment for costs;

6. For such other and further relief as the Court deems proper.

Dated: August 12, 1969

Respectfully submitted,

CECIL F. POOLE
United States Attorney

By PAUL E. LOCKE
PAUL E. LOCKE
Assistant United States Attorney

Attorneys for Defendants

CERTIFICATE OF SERVICE BY MAIL

I HEREBY CERTIFY that a copy of the foregoing JOINT ANSWER was this date mailed, postage thereon fully prepaid, to the following:

Feldman, Waldman & Kline
Leo E. Borregard
Leland R. Selna, Jr.
Matthew P. Mitchell
2700 Russ Building
San Francisco, California 94104
Attention: Leland R. Selna, Jr.,

attorneys for plaintiff.

Dated: August 12, 1969

PAUL E. LOCKE
PAUL E. LOCKE
Assistant United States Attorney

Corrected October 16, 1970

United States Court of Appeals
For the Ninth Circuit

SIERRA CLUB, a California corporation, *Appellee*, vs. WALTER J. HICKEL, individually, and as Secretary of the Interior of the United States; JOHN S. MCLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest, *Appellants*.	No. 24,966

[September 16, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: HAMLEY, KILKENNY and TRASK, Circuit Judges.

TRASK, Circuit Judge:

This is an appeal from an order of the district court granting a preliminary injunction. The action was instituted by a verified complaint filed by the Sierra Club, a non-profit California corporation, against Walter J. Hickel, individually, and as Secretary of the Interior, Clifford M. Hardin, individually, and as Secretary of

Agriculture, and the Superintendent of the Sequoia National Park and Supervisor of the Sequoia National Forest.

The relief sought was a declaratory judgment and preliminary and permanent injunctions enjoining issuance of the permits required for implementation of a plan proposed by Walt Disney Productions, Inc., for a large scale commercial-recreational development in and near Mineral King Valley in the Sequoia National Game Refuge located within Sequoia National Forest in California. The development also involved a proposed road which would in part traverse a portion of Sequoia National Park.

Amicus curiae briefs supporting the position of the defendants-appellants were filed by the United States Ski Association, the Far West Ski Association and the County of Tulare.

Jurisdiction of the district court was asserted under Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706; under the Federal Question Statute, 28 U.S.C. § 1331(a); the 1962 Mandamus Act, 28 U.S.C. § 1361; and under the Declaratory Judgments Act, 28 U.S.C. § 2201. Jurisdiction of this court rests on 28 U.S.C. § 1292(a)(1) authorizing interlocutory appeals from orders granting injunctions.

A brief summary of the controversy is as follows: In February 1965, the Forest Service of the Department of Agriculture published a prospectus inviting interested parties to submit proposals for the development of an all-year recreational project in Mineral King Valley in the Sequoia National Forest, in accordance with certain minimum requirements as established by the prospectus.

Walt Disney Productions (Disney) and five other bidders submitted proposals in response to the prospectus. After careful study the Secretary of Agriculture determined the Disney proposal to be the best. Thereafter, on October 10, 1966, a special use permit for planning was issued to Disney for a term of three years in order to enable Disney to make the necessary studies to prepare a master plan for the project which would meet with Forest Service approval. The plan was duly submitted and approved by the Forest Service on January 21, 1969, and is the plan that is the subject of this litigation.

In connection with the plan the Department of the Interior has proposed to permit the State of California to construct a new access road to Mineral King Valley. The new highway would be 20.4 miles long, of which 6.5 miles would cross Bureau of Land Management (Department of Interior) land, 9.2 miles would cross Sequoia National Park (Department of Interior) land, 1.8 miles would cross Sequoia National Forest (Department of Agriculture) lands, and the remaining 2.9 miles would cross various parcels of private property. It would approximately parallel the existing Mineral King roadway which appears on the map (See Record, 115) to be a tortuous road now described as substandard. In connection with the project, the Secretary of the Interior also agreed to grant a right of way for electrical transmission lines through the park.

In announcing the master plan and its approval, the Forest Service stated:

> "Our goal is to provide a needed public service so that the scenic, aesthetic, and recreational resources

> of Mineral King can be enjoyed by the American people as part of their heritage. At the same time, we intend to work with the Disney organization to assure that the development can be accomplished without substantial impairment or permanent undesirable ecological impact. We are confident that these twin challenges have been faced in a creative and artistic fashion." (T.R. 52.)

The initial description of the facilities proposed stated that accommodations would be provided for 1,505 overnight guests plus day visitors. A sub-level automobile reception center would be provided outside of the main Mineral King Valley with a cog-assist railway to transport people to the main village. No visitor automobiles would be allowed in Mineral King Valley proper. The announcement of the Forest Service continued:

> "While the Mineral King area is certain to become increasingly popular, its ultimate development will be guided by aesthetic and ecological limitations, rather than market potential. The Disney master plan has been designed with this consideration uppermost."

On the merits, the Sierra Club contends that the Secretary of Agriculture who has the responsibility under Congress for management of the national forests has exceeded his authority and has acted illegally as well as arbitrarily and capriciously in approving the master plan proposed by Disney. It urges that the Secretary of Agriculture's proposal to issue a term permit for an eighty acre parcel for a term of thirty years for construction of improvements such as hotels, pools and parking lots, and to issue a revocable permit for additional acreage upon which

such improvements as ski lifts, trails, and sewage treatment facilities would be built, would constitute illegal action in excess of authority. Second, the Sierra Club asserts that the action of the Secretary of the Interior in his proposal to permit the State of California to construct a road across Sequoia National Park for a distance of 9.2 miles to replace an existing road across the park would be illegal. Finally, the club asserts that no authority exists for the Secretary of the Interior to issue a permit for the construction of a transmission line across the park lands as a part of the master plan.

Encompassing all is the vehement argument of Sierra that the necessary result of the development proposal is the "permanent destruction of natural values" and the "irreparable harm to the public interest." These, it is asserted, are "irreversible effects of administrative lawlessness."

Article IV, Section 3 of The United States Constitution commits the management and control of the lands of the United States to Congress. That congressional power is unlimited. The Supreme Court said in *Gibson v. Chouteau,* 80 U.S. (13 Wall.) 92, 99 (1872):

> "With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations."

See also *Alabama v. Texas,* 347 U.S. 272, 274 (1954).

Congress may delegate the power to manage federal lands to the Executive. *Best v. Humboldt Placer Mining Co.,* 371 U.S. 334, 336-338 (1963). With respect to the national forests, Congress has authorized the Secretary

of Agriculture "to regulate their occupancy and use." Organic Administration Act, 16 U.S.C. § 551. With respect to national parks, Congress has authorized the Secretary of the Interior "to promote and regulate the use" of such parks, to "grant privileges, leases, and permits for the use of land" in the parks, and to cooperate with the Secretary of Agriculture in administering contiguous national forests. Organic Act of the National Park Service, as amended, 16 U.S.C. § 1, *et seq.*

The Secretaries purport to act pursuant to these basic sources of authority, together with supplemental legislative support.

(1) *Standing*

Appellants have raised the threshold question as to whether appellee has sufficient legal standing to bring this action. There is no dispute that Sierra Club is a legally organized and existing corporation. If an interest of such a corporate person, entitled to legal protection, is damaged or denied, that corporation is entitled to redress in the courts.

> "The only problems about standing should be what interests deserve protection against injury, and what should be enough to constitute an injury."[1]

Simply stated but difficult to apply, standing has been called "one of the most amorphous concepts in the entire domain of the public law."[2]

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[1]Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 468 (1970).

[2]*Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 861 (D.C. Cir. 1970).

The basic concept of standing was summarized in *Associated Industries v. Ickes,* 134 F. 2d 694, 700 (2d. Cir. 1943) as follows:

> "In a suit in a federal court by a citizen against a government officer, complaining of alleged past or threatened future unlawful conduct by the defendant, there is no justiciable 'controversy,' without which under Article III, § 2 of the Constitution, the court has no jurisdiction, unless the citizen shows that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen; such invaded interests must be either of a 'recognized' character, at 'common law' or a substantive private legally protected interest created by statute."

In that same case, in order to reconcile previous decisions of the Supreme Court where an individual was permitted to assert a position which appeared to protect a public interest rather than a traditional, substantive legally-protected interest of a citizen-plaintiff, the court suggested the "private Attorney Generals" theory, as follows:

> "While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public

> or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then in like manner there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals." 134 F. 2d at 704.

Such a notion would support the rationale of many cases, but not all. More recently, the amendment to the Administrative Procedure Act, and particularly Section 10, thereof, 5 U.S.C. §§ 701-706, together with a profusion of cases relying upon it and interpreting it, have developed new precedents on the law of standing. See, e.g., *Barlow v. Collins,* 397 U.S. 159 (1970); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970); *Flast v. Cohen,* 392 U.S. 83 (1968); *Citizens Committee for Hudson Valley v. Volpe,* 425 F. 2d 97 (2d. Cir. 1970); *Scanwell Laboratories, Inc. v. Shaffer,* 424 F. 2d 859 (D.C. Cir. 1970). See also Davis, *The Liberalized Law of Standing,* U. Chi.L.Rev. 450 (1970).

Turning to the facts of this case to determine whether plaintiff-appellee has standing, the Sierra Club in its complaint alleges that it is a non-profit corporation under the laws of the State of California. It claims a membership of approximately 78,000 nationally, with approximately 27,000 members residing in the San Francisco Bay

Area. It asserts that it has for many years taken a special interest in the conservation and sound maintenance of the national parks and forests and particularly lands on the slopes of the Sierra Nevada mountains. It states that "its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants as hereinafter more fully appears."

Up to this point there is no adversary position stated between the Sierra Club and the Secretary of Agriculture or the Secretary of the Interior. Not only do the latter have a special "interest" in the national parks and forests but they are charged by Congress pursuant to a constitutional mandate with the direct responsibility for the protection and conservation of the national parks and forests.

The club's complaint continues by outlining the recreational development proposal which constitutes the substance of its grievance. It concludes by particularizing the acts of the Secretaries which it asserts are in excess of statutory jurisdiction, are arbitrary and capricious and constitute an abuse of discretion. The proposed development and the permits to authorize it are alleged to be: (1) in violation of the statute limiting the size, terms and manner of occupation of lands for resorts and associated facilities; (2) in violation of the permit power of the Secretary of Agriculture; (3) beyond the jurisdiction of the defendants as to the National Game Refuge. In a second claim for relief the complaint asserts that a proposed highway will be built which will cross 9.2 miles of Sequoia National Park and that the authorization of this roadway is in excess of authority. In its brief the appellee complains of the proposed construction of a transmission line

within the park although this is not asserted in the complaint. The complainant does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened. Certainly it has an "interest" in the sense that the proposed course of action indicated by the Secretaries does not please its officers and board of directors and through them all or a substantial number of its members. It would prefer some other type of action or none at all. On the other hand, the United States Ski Association, the Far West Ski Association claiming 109,000 supporters, and the County of Tulare in which the development will be located, favor the action.

We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all of the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority.

The district court relied on four cases to support its position that the Sierra Club had standing. They are *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F. 2d 608 (2d. Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *United Church of Christ v. F.C.C.*, (123 U.S. App. D.C. 328), 359 F. 2d 994 (D.C. Cir. 1966); *Road Review League v. Boyd*, 270 F. Supp. 650, 661 (S.D. N.Y. 1967), and *Powelton Civic Home Owners Association v. Department of H. & U. Dev.* 284 F. Supp. 809, 825-28 (E.D. Pa. 1968).

The *Scenic Hudson* case involved a petition to set aside a license to Consolidated Edison of New York to con-

struct a pumped storage hydro-electric project on the west side of the Hudson River at Storm King Mountain. The petitioners were three towns and the Scenic Hudson Preservation Conference—an association of conservationist organizations. The license was issued by the Federal Power Commission after hearings under the provisions of the Federal Power Act in which petitioners participated as parties. Section 313(b) of the Act specifically grants to a party aggrieved by an order of the commission the right of review by the United States courts of appeals. There is no such statute involved in the present case to give standing.

In addition, the Second Circuit pointed out that several of the petitioners had sufficient actual economic interest to support their standing to obtain review. 354 F. 2d at 616-17. No such showing has been made in the present case.

The *United Church of Christ* case, *supra,* was one of a number of consumer cases. There the F.C.C. had denied to petitioners the right to intervene and, as listeners to the programming of a radio and television station to present their views in a proceeding to renew the license of that station. In that case as in other consumer cases, the court pointed out that the listeners were the persons "affected" or "aggrieved." They had standing in the same sense coal consumers were found to have standing to review a minimum price order[3] or that a transit rider had standing to appeal a fare increase.[4]

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[3] *Associated Industries v. Ickes,* 134 F. 2d 694 (2d Cir. 1943).

[4] *Bebchick v. Public Utilities Commission,* 287 F. 2d 337 (D.C. Cir. 1961).

Road Review League, supra, was a complaint to review and set aside an order of the Federal Highway Administrator establishing the alignment of an interstate highway. The plaintiffs were persons and organizations who would be directly affected by the proposed road including persons whose property would be taken. This identification of the plaintiffs is itself a statement of the distinction between that case and the one under consideration. *Powelton Civic Home Owners Association v. Department of H. & U. Dev., supra,* is the final case relied upon by the trial court. We consider it inapposite. It involved the location of an urban development project. The plaintiffs were persons whose homes and properties would be taken to implement the project. The court stated:

> "However, we are of the opinion that the plaintiffs also have standing in the more traditional sense: they have substantive legal rights conferred by the National Housing Act. They have private individual legal rights; and they are the appropriate representatives of legal rights conferred by the Housing Act on the general public." 284 F. Supp. at 821.

The *Powelton* case would be in point if the homes of residents at Mineral King were to be razed and those homeowners objected. There is no such showing.

On this appeal appellee does not limit itself to the four cases cited by the district court in support of its standing to sue. It calls attention to the recent cases decided by the Supreme Court and by the lower courts. We have examined each of these cases and others not cited, but fail to be convinced that any of them go so far as to support the standing claim here. We are not unmindful

of the Supreme Court's recent opinion in *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970), which was an action by plaintiffs, who sold data processing services to business generally, against the Comptroller of the Currency who had ruled that national banks could make their data processing services available to other banks and to bank customers. It was thus a competitor's suit and so designated by the Court. The first question to be asked by the Court was whether the Comptroller's action had caused injury in fact to the petitioners. The answer was that there was no doubt but that such injury existed or would develop in the future because the competition would entail loss of profits. Here, therefore, there was direct injury in fact, and therefore there was standing. The Court went beyond these facts in its discussion of standing generally and the effect of the Administrative Procedure Act in particular. It said that aside from the case or controversy test, standing is concerned with the question:

> "Whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153.

The significance of the language is not entirely clear. It is likewise not made clear in a companion case decided the same day and involving the same question.[5] We submit that it does not establish a test separate and apart from or in addition to the test which the Court first looked to in *Camp:*

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[5]*Barlow v. Collins,* 397 U.S. 159 (1970). See discussion of both cases in Davis, *supra.*

> "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. There can be no doubt but that petitioners have satisfied this test. The petitioners not only allege that competition by national banks in the business of providing data processing services might entail some future loss of profits for the petitioners, they also allege that respondent American National Bank & Trust Company was performing or preparing to perform such services for two customers for whom petitioner Data Systems, Inc., had previously agreed or negotiated to perform such services." 397 U.S. at 152.

This is the test which will reconcile most if not all of the decided cases and also fit the standard of the Administrative Procedure Act. "Standing to sue," as the phrase indicates, refers to the posture of the plaintiff and not to the "legal interests" to be unravelled. The Court said in *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969):

> "In this sense, the concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought. See *Flast v. Cohen, supra*, at 99-100. The decisions of this Court have also made it clear that something more than an 'adversary interest' is necessary to confer standing. There must in addition be some connection between the official action challenged and some legally protected interest of the party challenging that action. See *Flast v. Cohen, supra*, at 100-106."

Nor does the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and particularly Section 702, aid the appellee

here.[6] Judge Burger, now Mr. Chief Justice Burger, in a concurring opinion in *National Association of Securities Dealers, Inc. v. SEC*, 420 F. 2d 83, 101 (D.C. Cir. 1969), *cert. granted*, 397 U.S. 986 (1970), commented that the above section broadened the basis of standing, as follows:

> "Appellees also assert that § 702(a) (Supp. II, 1967), embodies an independent and self-sufficient statutory basis for standing. I do not feel that the APA was meant to arrest the development of the law of standing as of the date of its passage:
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> '[W]e would certainly be prepared to hold in an appropriate case that one who complains of administrative action may find a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption. . . .'
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> "Kansas City Power & Light Co. v. McKay, 96 U.S. App. DC. 273, 282, 225 F.2d 924, 933, *cert. denied*, 350 U.S. 884 (1955). *Nevertheless, although the review provisions of the APA were not meant to retard the judicial development and adaptation of the law of standing, it does not establish an independent right to review absent judicially articulated notions of 'legal wrong' of 'adversely affected or aggrieved . . . within the meaning of any relevant statute.'* See Pennsylvania R.R. Co. v. Dillon, *supra* note 2." 420 F.2d at 104 n.5. (*Emphasis supplied*).

In almost every carefully-considered case where standing is sustained it is apparent in the facts or in the opinion that when the situation of the plaintiff is examined there is an element of legal wrong being afflicted upon

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[6] "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

him or he is adversely affected by agency action or aggrieved within the meaning of a relevant statue.[7] That adverse effect, of course, need not be economic but, as the Supreme Court has recently observed, may be aesthetic, conservational or recreational. *Data Processing, supra,* 397 U.S. at 154. It is this element which appellee fails to sufficiently allege in its complaint and support by its exhibits attached. It does not allege that it is "aggrieved" or that it is "adversely affected" within the meaning of the rules of standing.[8] Nor does the fact that no one else appears on the scene who is in fact aggrieved and is willing or desirous of taking up the cudgels create a right in appellee. The right to sue does not inure to one who does not possess it, simply because there is no one else willing and able to assert it.

We do not believe that the Sierra Club's complaint alleges that it or its members possess a sufficient interest for standing to be conferred. There is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them.

In holding that the complaint fails to allege that the Club has the requisite standing to institute this action, we are aware that federal courts have accorded the Club standing to object to alleged administrative infringement upon natural resources in two recent cases: *Citizens Com-*

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[7]Davis, *supra* at 466. See also *South Hill Neighborhood Assn. v. Romney,* 421 F. 2d 454 (6th Cir. 1969), *cert. denied,* 397 U.S. 1025 (1970).

[8]"Aggrieved" is defined as "Having suffered loss or injury; damnified; injured." Black's Law Dictionary 87 (4th ed. 1968).

mittee for the Hudson Valley v. Volpe, 425 F.2d 97, (2nd. Cir. 1970) and *Parker v. United States,* 307 F. Supp. 685 (D. Colo. 1969). In both of these cases, however, the Sierra Club was joined by local conservationist organizations made up of local residents and users of the area affected by the administrative action. No such persons or organizations with a direct and obvious interest have joined as plaintiffs in this action.[9] The question of standing here must be decided from the facts in this action. We hold that they do not establish the interest necessary for that purpose.

(2) *The merits*

Apart from questions of standing, an order granting a preliminary injunction must be based upon established equitable grounds. "The grant of a preliminary injunction is the exercise of a very far reaching power never to be indulged except in a case clearly warranting it." *Dymo Industries, Inc. v. Tapeprinter, Inc.,* 326 F.2d 141, 143 (9th Cir. 1964). In order to obtain such relief, particularly against the discretionary action of an official of cabinet rank, the plaintiff must establish a strong likelihood or "reasonable certainty" that he will prevail on the merits at a final hearing. *Garlock, Inc. v. United Seal, Inc.,* 404

[9]To the extent to which *Citizens Committee for Hudson Valley v. Volpe,* indicates that the Sierra Club has standing within the "private Attorney Generals" rule, we respectfully disagree. We believe that rule is limited as it states to cases where Congress has enacted a statute "conferring on any non-official person, or on a group of non-official persons, authority to bring a suit" to prevent unauthorized official action. See, *Scanwell Laboratories, Inc. v. Shaffer,* 424 F. 2d at 864. We find no indication in any federal statute that Congress has "conferred" on the Sierra Club or any group like it, authority to bring suits to challenge official action.

F.2d 256, 257 (6th Cir. 1968); *H. E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13, 17 (2d Cir. 1963).

> "It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case. Unless the court be convinced with reasonable certainty that the complainant must succeed at final hearing the writ should be denied." *Hall Signal Co. v. General Ry. Signal Co.*, 153 F. 907, 908 (2d Cir. 1907).

In addition, before such a writ should issue, the applicant must show that it will suffer irreparable injury. The court must balance the damage to both parties. *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969). The injunction must rest upon a convincing presentation and, because of this, an appellate court may reverse an order granting a preliminary injunction where the appellee's showing is something less than the persuasive demonstration upon which an injunction must be predicated. *District 50 UMW v. International Union, UMW*, 412 F.2d 165, 167 (D.C. Cir. 1969); *Udall v. D.C. Transit System, Inc.*, 404 F.2d 1358, 1360-61 (D.C. Cir. 1968). As will appear, the appellee herein has shown neither a reasonable certainty that it will prevail nor irreparable injury.

We recognize that in appraising these issues, even upon a preliminary basis, our function is not to make an original judgment or to make a final decision on the merits. See, e.g., *Public Service Commission of Wisconsin v. Wisconsin Telephone Co.*, 289 U.S. 67, 70 (1933); *Industrial Bank of Washington v. Tobriner*, 132 U.S. App. D.C. 56, 405 F.2d 1321, 1324 (D.C. Cir. 1968). The district court has done this. The function of this court on appeal is

to determine whether in that original preliminary injunction there has been an abuse of sound discretion of the district court. *Washington Capitols Basketball Club Inc. v. Barry,* 419 F.2d 472, 475 (9th Cir. 1969); *Ross Whitney Corp. v. Smith Kline & French Labs.,* 207 F.2d 190, 194 (9th Cir. 1953).

The district court has first considered the development in the light of the permits which are to be issued by the Secretary of Agriculture and has concluded that it "may involve a violation not only of the letter, but also the purpose and intent" of the applicable law. The court directed its attention particularly to the use by the Secretary of his authority to issue permits to accomplish the objectives sought. Examining the same documentation in the light of the established practices of the Secretary, we respectfully come to a different conclusion.

The proposal of Disney and the action taken by the Secretary is to permit a land use of forest lands by the issuance of two types of permits. The first type is a term permit for an aggregate of eighty acres with a maximum term of thirty years. The second is called a "revocable permit", meaning the Secretary imposes no limitation on time or acreage.

The district court has concluded that Congress has never expressly authorized revocable permits and that the only authority to issue them is under the general power to regulate the forests and under a 1928 Attorney General's opinion. Upon such a tenuous base, the broad application which is proposed here becomes questionable to the lower court. We find the Secretary's authority rests upon much firmer ground.

Originally the management of the lands reserved for national forests was under the supervision of the Secretary of the Interior. In 1905 these powers were transferred to the Secretary of Agriculture,[10] and he was given authority to make rules and regulations to preserve the forests from destruction.[11] As early as May 31, 1905, the Secretary of Agriculture was advised by the Attorney General that he had the authority to issue revocable permits.[12]

This permit authority under the Secretary's general regulatory power was upheld by the Supreme Court in *United States v. Grimaud,* 220 U.S. 506 (1911). At the time of the amendment of 16 U.S.C. § 497 in 1956 to authorize the issuance of term permits for eighty acres for thirty years, the House Report commented on the practice of the Secretary to issue revocable permits under his general regulatory powers, saying:

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[10] Act of Feb. 1, 1905, Ch. 288, 33 Stat. 628.

[11] Act of June 4, 1897, 30 Stat. 35.

[12] An application for a permit to occupy forest lands for use in conducting a fish salter, oil and fertilizer plant was made to the Secretary. He requested an opinion from the Attorney General as to his authority. Replied the Attorney General:

> "It would therefore seem that when, in the exercise of that discretion, you determine that the granting of a permit to use and occupy a reservation for a specified purpose is consistent, according to your judgment, with insuring the objects for which the reservation was created, then your decision in the premises is definitive and subject to review in no other way than by the Congress from which your power to act was derived. Answering your first question therefore, I have to advise you that, in my opinion, you possess authority to grant a permit for such a purpose as that set forth in the application referred to by you."

In the same opinion, with respect to an inquiry as to the time for which such a permit might be issued, the Attorney General responded ". . . the permits should not be given for a longer period than, under the circumstances of each case would seem reasonable." 25 Op. Att'y Gen. 470, 472 (1905).

"The Department of Agriculture now has adequate authority to issue revocable permits for all purposes under the act of June 4, 1897 (16 U.S.C. 551)." House Report No. 2792, U.S. Code Cong. & Ad. News, p. 3635 (1956).[13]

The court below has understandably relied upon the authority of the opinion of the Attorney General to the Secretary of War, 35 Op. Atty. Gen. 485 (1928). That opinion is the basis for the court's discussion of the necessity that a revocable permit be terminable "at will" and that therefor *this* permit is not properly issued. We have found no such limitation apart from this Attorney General's opinion. The same erroneous premise results in the district court's concern about the removability of any improvements placed upon the land covered by the revocable permit. It is at the bottom of the district court's conclusion that a combination of a term permit and a revoc-

[13]The district court has cited and relies upon an opinion of the Attorney General in 1928 as one which "narrowly" restricts the implied power of the Secretary of Agriculture to issue revocable permits. 35 Op. Att'y Gen. 485 (1928). This opinion for some inexplicable reason was cited to the district court by the defendants. It had nothing to do with the authority of the Secretary of Agriculture under the statute granting him power over the forests. It was an opinion addressed to the Secretary of War in answer to an inquiry as to whether the Secretary of War had the authority to grant to the Southern Pacific Railroad Co. a permit to construct a railroad line across a portion of a California military reservation. The Attorney General pointed out that the Secretary of War had no power to grant any permanent estate for railroad purposes and no express statutory authority to grant revocable licenses or permits. The opinion also pointed out a long administrative practice in granting some revocable permits and then in the guarded language quoted by the trial court below, opined that in very limited circumstances such a revocable permit might be granted. Counsel for the Secretary of Agriculture apparently cited this opinion for lack of one directly in point. It need not have done so. As the district court pointed out, the opinion adds nothing to the Secretary's case.

able permit may be an impermissible and unlawful exercise of administrative authority. Beginning from a correct premise that the revocable permit is an approved device for forest management under Congressional mandate from the Attorney General, the Supreme Court and the Congress, we believe an entirely different conclusion would have been reached. The fact that the record discloses that there are now a total of at least eighty-four recreational developments on national forest lands in which there is such a combination of the term permit and the revocable permit is convincing proof of their legality.[14] Many of these developments are ski developments making use of maximum acres of the term permit plus revocable permits for additional acreage in amounts in some cases in excess of 6,000 acres. See the United States Forest Service tabulation in Appendix, Brief of Amicus Curiae Ski Association. It seems apparent, as was obvious to both Senate and House Committees, that the eighty-acre long-term permit was a necessity to obtain proper financing for substantial permanent improvements, while developments of less magnitude and permanency, such as trails, slopes, corrals, could be placed upon lands held under revocable permits.[15] We find no indication in those reports that ski lifts are limited to the term permits. The planned development in the instant case discloses that most major improvements are to be located upon lands held under the eighty-acre term permits while lifts and trails will be in-

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[14] Affidavit of W. S. Davis, Assistant Regional Forester, California Region, Record p. 238. See *Udall v. Tallman*, 380 U.S. 1 (1965), which holds that great deference must be given to interpretations of statutes of officers or agencies charged with their administration.

[15] See Senate Report No. 2511, Record p. 298; House Report No. 2792, Record p. 293.

stalled "throughout about 13,000 acres."[16] Evidence of great concern for the ecology of the area and the preservation and conservation of natural beauty and environmental features appears throughout the planning reports attached as exhibits. We find little or no liklihood of success in opposing the proposed development upon the ground that there would be an illegal use of term and revocable permits.

A. *Permit for Highway*

The district court next discusses the proposal of the Secretary of Interior to issue a permit to the State of California to construct a segment of roadway through the national park. The road proposed is one from an existing state highway (Cal. 198) to Mineral King. No cases have been cited to illustrate the alleged impropriety of this permit to cross 9.2 miles of national park lands in the twenty mile route from Three Rivers to Mineral King. We know of none. In fact, there is an existing road from Three Rivers to Mineral King which traverses the same park. That road is a narrow substandard roadway with sharp switchbacks rising from an elevation of 1,160 feet at its junction with Route 198 to an elevation of 7,830 feet at Mineral King. Most of it has oiled surface with a portion graded only. It does not qualify for state maintenance (Record 101). The proposed road follows the alignment of the old road to some extent and substantially parallels it in others. The record shows a great deal of concern in its planning for preservation of aesthetic and

[16]The gross acreage of Sequoia National Forest is 1,178,767 acres, which does not include areas within Sequoia National Park or King's Canyon National Park.

ecological values. The defendant Superintendent of the National Park concerned has stated under oath that the construction will be engineered.

> ". . . so that there will be a minimum impact on the national park values. The alignment of the road will be carefully selected to protect the Sequoia trees, natural areas, existing drainage ways, and the overall ecology of the area." (Record 251; see also as to Sequoia trees and wild-life, Record p. 103-104.)

No question is raised as to the wide discretion given to the Secretary of the Interior in managing national parks to construct and improve roads and trails therein. See 16 U.S.C. § 8. We know of no law and find little logic in a contention that a twisting, substandard, inadequate road through 9.2 miles of the park is legal but that an improved all weather two lane highway along a new but approximately parallel alignment is illegal. No authorities have been cited in support of such a position. We cannot find in the appellee's contentions concerning this proposed road any degree of substantiality.

B. *Permit for Transmission Line*

Although not alleged in the complaint, appellee has questioned in its brief and the district court has alluded to the proposal of the Secretary of the Interior to grant permission for a right of way for a power line to provide electrical power for uses in connection with the project. Again, with deference, we fail to find this a substantial issue upon which to base the grant of a preliminary injunction. It seems unlikely that the appellee could prevail as to such a contention. Under 16 U.S.C. § 5 authority is

clearly provided to the Department of the Interior in its management of parks to grant permits and easements for rights of way for "electrical poles and lines for the transmission and distribution of electrical power." It is suggested, however, that under 16 U.S.C. § 45 (c) such a permit may not be issued without an act of Congress. This latter section does apply specifically to Sequoia National Park. It recognizes in the first portion of the section, existing valid claims for homesteads, mineral rights or rights for any other purposes whatsoever; it then gives to the Secretary authority to issue permits for timber cutting and grazing and concludes with a proviso that:

> ". . . no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress."

The Secretary contends that this section was intended to apply only to the construction and development of hydroelectric projects and related facilities including power lines. In the context of 16 U.S.C. § 5 and the unlikely intention to require an act of Congress for each electrical line within the park we accept the argument of the Secretary as convincing.

C. *Public Hearings*

Finally, the trial court pointed to the contention of the appellee that no public hearings were ever held with respect to the highway. The existence of any such re-

quirement upon the Secretary of Interior or the Secretary of Agriculture is unclear. It does appear, however, that there was a hearing on this project in 1953. It also appears that there was a public hearing on August 10, 1967. (Record p. 96; 111; 230). The hearing was held by the California Division of Highways which would have been the permittee and was working closely with Agriculture and Interior. It is described in Exhibit F as having been a "well-publicized" public hearing attended by approximately 210 persons including California Assemblymen or their representatives, members of the Boards of Supervisors of Kern County and Tulare County, the Superintendent of Sequoia National Park, the Supervisor of Sequoia National Forest, representatives of fish and game, forest service, Federal Water Pollution Control Administration and civic and public organizations. The Sierra Club was present. It does not appear that the proposed roadway was any clandestine project. As a matter of fact, it does not appear that a permit was issued until more than a year later and then subject to agreement upon design standards. The matter of public hearings cannot be considered a substantial factor in this proceeding.

D. *The National Game Refuge*

A portion of the land within the area under consideration has been designated as a National Game Refuge. It has been suggested that this project would somehow interfere with the refuge and be in excess of authority. The act establishing the refuge declares that:

> "The hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of

> the United States within the limits of said area shall be unlawful."

except under regulations of the Secretary of Agriculture.[17] We find no substance in this argument.

The appellee has not shown with any degree of certainty that it will or can succeed. Neither has it shown that it, or its members or anyone else will suffer irreparable injury. This is not a case "clearly warranting" the grant of a preliminary injunction. *Dymo Industries, Inc. v. Tapeprinter, Inc., supra.* 326 F.2d at 143. The nation's natural resources are not the property of any particular group. One of the basic social ills of today is that we have too many people living too close together. It appears that the friction thus created is becoming increasingly abrasive. The satisfaction of the basic necessities of such a population creates environmental problems which are not within the expertise of this court. We cannot say, however, that the Secretary of Agriculture and the Secretary of the Interior have made an arbitrary and capricious judgment in determining to make available a vast area of incomparable beauty to more people rather than to have it remain inaccessible except to a rugged few.

The Order granting the preliminary injunction is vacated and the cause is remanded for further proceedings in conformity herewith.

HAMLEY, J. (Concurring):

In my view Sierra Club has standing to prosecute this lawsuit. It seems to me that the rationale of recent Su-

[17] 16 U.S.C. § 688.

preme Court pronouncements in this area, if not the precise holdings, call for such a determination. In *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 154 (1970), as the majority itself notes, the Supreme Court made it clear that the element of legal wrong need not be economic in nature, but may be aesthetic, conservational or recreational.

The Sierra Club represents thousands of members who have a deep interest in aesthetic, conservational and recreational values of a kind intended to be safeguarded by the statutes in question, and the regulations and practices thereunder. If these statutes are being disregarded, or the regulations and practices thereunder are invalid, and the result is that the described values are being undermined or disregarded, it seems to me the Sierra Club members may assert that a legal wrong is being inflicted upon them—a wrong which their chosen organization has standing to resist in this lawsuit.

However, for the reasons stated in the last section of the majority opinion, under the heading "The merits," I am convinced that the granting of the preliminary injunction amounted to an abuse of discretion and therefore must be reversed. The trial court acted with painstaking care which is deserving of high commendation, but, in my view, there is an inadequate legal foundation for the order entered.

Supreme Court of the United States

No. 939 ----- *, October Term, 19* 70

Sierra Club,

Petitioner,

v.

Rogers C. B. Morton, Individually, and as Secretary of the Interior of the United States, et al.

ORDER ALLOWING CERTIORARI. Filed February 22, 1971.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

FILED
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E. ROBERT SEAVER,

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. ~~839~~ 70-34

SIERRA CLUB, a California corporation,
Petitioner,

vs.

WALTER J. HICKEL, individually, and as Secretary of the Interior of the United States; JOHN S. MCLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No.

SIERRA CLUB, a California corporation,
Petitioner,

vs.

WALTER J. HICKEL, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 16, 1970.

CITATIONS TO OPINIONS BELOW

Neither the opinion of the United States Court of Appeals for the Ninth Circuit (App. A, pp. 1-28) nor the memorandum of decision of the United States District Court for the Northern District of California (App. B, pp. 29-42) has been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 16, 1970. On October 6, 1970, the Court of Appeals signed an order staying issuance of its mandate pending filing, consideration and disposition of this petition for writ of certiorari, provided that the petition is filed on or before November 6, 1970. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the Sierra Club, an old and well-established organization with a special interest and competence in matters affecting the scenery, ecology and recreational use of the Sierra Nevada mountains, have standing to sue to prevent federal officials from illegally authorizing acts which would produce permanent damage in Sequoia National Park and Sequoia National Game Refuge located in the Sierra Nevada mountains?

2. Must a conservation organization show threatened damage to itself as an organization, and not merely damage to the aesthetic, recreational or conservation interest of its members and others in order to have standing?

3. Where irreparable harm is inevitable if a preliminary injunction is not granted, must the plaintiff prove a "reasonable certainty" of prevailing on the merits, or is some lesser degree of likelihood adequate to support that injunction?

4. May the Secretary of Agriculture circumvent Congress' 80 acre limitation on long-term permits for the use of national forest land by issuing not only such a long-term permit for 80 acres but also a supplementary permit for facilities occupying much greater acreage, where the supplementary permit is revocable neither in fact nor in law?

5. May the Secretary of the Interior authorize others to construct a major connecting link highway across Sequoia National Park for a non-park purpose?

6. May a statute requiring Congressional approval of any transmission line located in Sequoia National Park be ignored by the Secretary of the Interior?

7. May the Secretary of the Interior lawfully disregard his own rule calling for public hearings on proposed park roads?

8. May the illegal effect of the failure of the Secretary of the Interior to conduct a required public hearing be dispelled because the State Division of Highways conducted a hearing?

9. May the Secretary of Agriculture authorize a huge private resort development in a national game refuge without first finding the proposed use consistent with the mandate of Congress in creating the refuge?

STATUTES INVOLVED

The provisions of law involved are:

Article IV, Section 3, clause 2, Constitution of the United States;

Administrative Procedure Act as amended by Pub. L. 39-554, 80 Stat. 381 et seq., 5 U.S.C. §§ 551(5), 553, 702-706;

Conservation Code, 16 U.S.C. §§ 1, 5, 8, 41, 45c, 497, 551 and 688, codifying 39 Stat. 535, 48 Stat. 389; 36 Stat. 1253, 66 Stat. 95; 43 Stat. 90; 26 Stat. 478; 44 Stat. 820; 70 Stat. 708; 30 Stat. 35, 76 Stat. 1157, 78 Stat. 745; 62 Stat. 861.

Rules for Roadbuilding in National Parks, F.R. Doc. 69-1177 (Jan. 28, 1969).

These laws are set out in Appendix C.

STATEMENT

The Sierra Club is a nonprofit corporation whose growing national membership was approximately 78,000 when the complaint in this matter was filed on June 5, 1969. Approximately 27,000 members then resided in the San Francisco Bay Area (R. 1, 2). One of its principal purposes is the conservation and protection of the natural resources of the Sierra Nevada Mountains (R. 2).

"Environmental Quality", the first Annual Report of the Council on Environmental Quality transmitted to the Congress August, 1970 by President Nixon, lists the Sierra Club prominently among organizations which "...

exist to inform, guide, or represent their members in a wide variety of environmental and conservation matters." (*Id.* at 215).

The Second Circuit has described the Sierra Club as a "national conservation organization with substantial membership . . . and a history of involvement of the preservation of national scenic and recreational resources." See *Citizens Committee for Hudson Valley v. Volpe,* 425 F.2d 97, 103 (1970).

The Sierra Club was aware of the possibility of Forest Service plans for the development of Mineral King in the 1940's (R. 87). The Club became especially concerned in 1965 when it became apparent for the first time that the Secretaries of Agriculture and Interior and their aides were seriously considering a development as massive as that proposed by Walt Disney Productions, Inc. ("Disney").

In 1965, the Sierra Club appointed a member of its staff who was familiar with Mineral King and the development proposal to act as one of its spokesmen. J. Michael McCloskey, the assigned staff member, promptly expressed the Sierra Club's concern about the development proposal, and requested public hearings on the subject. The requests were denied. The record includes letters and a telegram dealing with these requests (R. 81-87).

Subsequently, when it became apparent that hearings would not be held, and that the Disney proposal, together with all of its ramifications (power lines, new roads, adverse effects upon animal and plant life, etc.) was to be

approved, the Sierra Club filed this lawsuit for declaratory relief and to enjoin the Secretaries and their aides from issuing permits.

There is no suggestion in the record that the Club did not fully exhaust its administrative remedies prior to filing the suit; or that the controversy was not "ripe"; or that the Sierra Club will not vigorously and adequately present its position that the Secretaries are acting in excess of their statutory powers.

The jurisdiction of the District Court was invoked under Section 10 of the Administrative Procedure Act, 5 U.S.C. §§701-706; the Federal Question Statute, 28 U.S.C. §1331(a), the 1962 Mandamus Act, 28 U.S.C. §1361 and the Declaratory Judgment Act, 28 U.S.C. §2201. Jurisdiction of the Ninth Circuit was based upon 28 U.S.C. §1292(a)(1).

To understand why the Secretaries' proposed action conflicts with the special legislation which controls the use of Mineral King, one must understand something about the area.

Mineral King Valley is in the Sierra Nevada Mountains, surrounded on three sides by Sequoia National Park. The bottom of the Valley lies at about 8,000 feet; surrounding peaks range to approximately 12,000 feet. Geographically and ecologically, Mineral King is part of Sequoia National Park (R. 66). Due to the existence of mining claims in the Valley, Congress did not formally include Mineral King when the surrounding land was incorporated into the Park in 1926. However, at that time, it did designate the entire Mineral King enclave as Sequoia National Game Refuge (R. 82).

In January, 1966, without hearings, the Disney proposal was chosen over those of five other bidders and Disney received a temporary planning permit. While the solicitation was for a facility including four ski lifts and resort accommodations for 100 skiers (R. 67), Disney's proposal includes a village incorporating major hotels and lodges for over 3,000 overnight guests, ten restaurants, a chapel, theatre, general store, five story parking facility, hospital and sewage treatment facilities (R. 67, 68, 92-94). Other facilities would include power plants, and associated installations, swimming and ice skating facilities, twenty ski lifts, a cog assisted railroad, avalanche dams and stream control features, and a development scheme which would require "extensive bulldozing and blasting in most lower areas and extensive rock removal at high elevations" and the "grooming and manicuring" of most slopes (R. 72).

The projected daily use of Mineral King by as many as 14,000 persons (R. 186) would produce nearly twice the concentration of persons found in Yosemite Valley on busy days (R. 68).

Mineral King is reached by a low-standard road from Hammond, California constructed to support the mining activities of the 1870s. In the course of its twenty-six mile route from the west, it traverses a portion of Sequoia National Park, which was established in 1890 (16 U.S.C. §41). Agriculture's plan assumes a new highway which would open the way to larger numbers of Disney's paying customers (R. 99. 101, 106).

The proposed plan calls for a major highway across Sequoia National Park. It is represented as consisting

of two lanes with frequent passing lanes (R. 102). However, the record shows that there is reason to believe that this highway capacity will prove to be inadequate. Former Secretary of the Interior Udall said in a letter to former Secretary of Agriculture Freeman in 1968:

> "In addition to our desire to minimize the damage to park values by the road, we are concerned about what we have been told concerning the size of the planned Disney development. Will one two lane road of park standards be adequate, or will Interior later receive a request for another road?" (R. 182).

Consultant John Clarkeson said:

> "Unless some control or other means is considered, this two-lane road does not look at all adequate for a 14,000-a-day visitor load where so many will be one-day visitors." (R. 200).

The new highway in its two-lane configuration in the mountainous area would include "extensive cutting and filling . . . accompanied by extreme back slopes and embankment slopes to accomplish a stable earthwork condition . . . [E]mbankments as much as 600 feet and 700 feet wide at the bottom of the prism are required to hold up a mere 28 feet for highway width." (R. 193, 194). The fragile nature of the area through which the highway would pass guarantees that the scars produced would be very slow to heal (R. 185).

As of October 24, 1967, the State of California committed $22,000,000 of state gas tax funds for the construction of the new highway which would dead-end at Mineral King (R. 69), but the Secretary of the Interior opposed the section which would cut across Sequoia

National Park and urged that a better alternative be found (R. 106-108). He later acquiesced in its location within the Park only reluctantly (R. 181).

On January 27, 1969, the Secretary of Agriculture, through his Forest Service aides, approved Disney's plan and stated that a thirty-year term permit for 80 acres of game refuge and an accompanying permit for the additional acreage would issue automatically upon execution by the State of California of the first contract for construction of a significant portion of the new highway (R. 68). Soon after, Interior threatened to issue the highway permit to the State (R. 69) which would have set the entire project in motion. It also threatened to authorize a transmission line in the Park without first obtaining Congressional approval (R. 89). At this stage, the Sierra Club sought a preliminary injunction.

District Judge William T. Sweigert probed the matter in the course of hearings on two days and found that the Club had raised serious and substantial questions concerning the statutory authority of the defendants to permit the threatened massive alterations of Sequoia National Park and Game Refuge. He found that there was an imminent threat of irreparable harm and that preservation of the *status quo* required issuance of a preliminary injunction (App. B, p. 41).

The Court of Appeals disagreed. It held that the Sierra Club lacked standing to prosecute this lawsuit. It also held that the Secretaries had acted properly and that the Sierra Club had shown no threat of irreparable injury to itself or anyone else arising from the Secretaries' proposed action.

REASONS FOR GRANTING THE WRIT

1. THE NINTH CIRCUIT'S DECISION ON STANDING CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

In its decision on standing, the Ninth Circuit has split with controlling decisions of this Court, and the decisions of other circuits.

The most obvious conflict is between the opinion in this case and the decision of the Second Circuit in *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97 (1970). The Ninth Circuit recognizes the conflict in its opinion:

> "To the extent to which *Citizens Committee for Hudson Valley v. Volpe* indicates that the Sierra Club has standing within the 'private Attorney Generals' rule, we respectfully disagree." (App. A, p. 17, footnote 9).

The cases are indistinguishable. In each, the Sierra Club was a plaintiff. In each, it alleged that a government official (undoubtedly invested with broad authority and discretion in many areas) had overstepped the bounds of his authority in a particular area in which Congress had seen fit to narrow and restrict the scope of that discretion. In each, the objective of the lawsuit was to prevent unauthorized and unlawful destruction of an important scenic and recreational resource. In each, the Sierra Club had a number of members in the general area of the proposed construction. In neither case did the Sierra Club show direct pecuniary interest. In the Second Circuit, the Sierra Club had standing. In the Ninth Circuit, wherein lie the Sierra Nevada Mountains

from which the Sierra Club takes its name, the Sierra Club was held to lack standing.

The decision in this case also conflicts with the D.C. Circuit's decision in *Environmental Defense Fund, Inc. v. Hardin,* 428 F.2d 1093 (D.C. Cir. 1970). In that case, all of the parties seeking review were conservation organizations of one type or another, the Sierra Club among them. They were found to have standing. The Court said, inter alia:

> ". . . the consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem.
>
> "On the basis of petitioners' uncontroverted allegations, it appears that they are organizations with a demonstrated interest in protecting the environment from pesticide pollution. Therefore they have the necessary stake in the outcome of a challenge to the Secretary's inaction to contest the issues with the adverseness required by Article III of the Constitution." (428 F.2d at 1097; footnotes omitted).

The issue in this case is not academic. We have learned with shocking suddenness that the land, the air and the water are finite. We learn that America the Beautiful can be America the Ugly unless positive steps are taken to preserve it. Congress has expressed its commitment to conservation repeatedly over the years since early conservation efforts led to the creation of the National Park System.

The Secretaries are under pressure to commit public lands to commercial exploitation, both to justify budgetary requirements of their agencies and to please powerful

and persuasive applicants for development permits. In dealing with large areas of ordinary federal lands, the Secretaries have broad discretion. In dealing with Sequoia National Park and Sequoia National Game Refuge, their discretion is greatly limited by statute because those portions of the public lands are not merely valuable real estate but a priceless national resource.

Where a federal official has in fact acted in excess of his statutory authority, or contrary to it, there is only one effective remedy: A lawsuit. Since Congress has already expressed its will in the statute, and the officer has equally expressed his intention to disregard the will of Congress, the remedy (if there is to be one) must be in the courts.

A narrow interpretation of "standing" means that many types of lawless administrative action will remain beyond the reach of justice. Here, the question is especially important because, unless defendants' lawlessness can be curbed now, it can never be curbed at all. The proposed changes in topography and vegetation of the Mineral King area, to be achieved with blasting powder, bulldozers and chain saws, will be irreversible and irreparable for all the foreseeable future.

Moreover, the Sierra Club is the only actual (or indeed likely) spokesman for the public interest in the preservation of Mineral King from the effects of illegal action. If the public interest is to have any meaningful representation in a decision which will have lasting and irreversible consequences for the disposition of the public lands, then the Sierra Club, or some comparable organizations, must have an opportunity to be heard.

The issue here is not a choice between the Sierra Club and a more appropriate plaintiff but between the Sierra Club and nobody. Cf. *Alderman v. United States,* 394 U.S. 165 (1969).

The standing of responsible conservation groups such as the Sierra Club has been recognized in a series of ground-breaking cases in this Court and in the other Courts of Appeal. See especially *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970); *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir. 1970); *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2d Cir. 1965); *Parker v. United States,* 307 F.Supp. 685 (D. Colo. 1969).

The Ninth Circuit's attempt to distinguish these key cases is transparently feeble. After conceding that the interest which entitles a plaintiff to standing may be "aesthetic, conservational and recreational," the Ninth Circuit reverts to Black's Law Dictionary (4th Edition) for a definition of "aggrieved." (App. A, p. 16, footnote 8). It ignores the cases which define "adversely affected or aggrieved" in the precise legal context here in issue—citizens' groups championing conservational interests.

The Ninth Circuit has attempted to distinguish the *Citizens Committee* and *Parker v. United States* cases, *supra,* on the following grounds:

> "In both of these cases, however, the Sierra Club was joined by local conservationist organizations made up of local residents and users of the area affected by the administrative action." (App. A, p. 17).

But who, if not the Sierra Club, is the "local organization" concerned with the preservation of the Sierra Nevada Mountains? Who, if not Sierra Clubbers, are the users of this remote and beautiful area? Must the Sierra Club introduce into evidence (on a motion for preliminary injunction) the literature which it has published on the Sierra Nevada over a period of 80 years in order to sustain its standing? Should it have called as witnesses its members who have hiked the high country of Mineral King? Should it have introduced the record of its participation in the expansion of Sequoia National Park and the creation of Sequoia National Game refuge in 1926? Or is it enough, as other circuits have held, that the Sierra Club is a substantial and serious conservation organization?

In any event, if the Ninth Circuit's requirement that "local residents and users" be joined with the Sierra Club is the touchstone of its standing, the only likely result will be routine joinder of a local resident (or an ad hoc conservation committee) in any future conservation case. A viable rule cannot rest upon such a fragile distinction. Either the Sierra Club has standing in its own right, or it does not. The question is an important one, and this court should decide it.

On a more technical but no less important level, the Ninth Circuit's Mineral King decision conflicts with the decision of the District of Columbia Circuit in *Scanwell Laboratories, Inc. v. Shaffer,* 424 F.2d 859, 861 (1970). In that case the D. C. Circuit held that the plaintiff had standing to challenge a government contract award to an allegedly ineligible bidder even though it would *not* be

entitled to the contract itself if successful. The suit was permitted under the "private attorney general" theory which the Ninth Circuit here rejects. In *Scanwell,* the court noted, in discussing *Flast v. Cohen,* 392 U.S. 83 (1968):

> "Thus, in spite of the fact that the Supreme Court has not yet chosen to hold that the Administrative Procedure Act applies to all situations in which a party who is in fact aggrieved seeks review, regardless of a lack of legal right or specific statutory language, it is clearly the intent of that Act that this should be the case. . . .
>
> "Of course it is true that the grant of standing must be carefully controlled by the exercise of judicial discretion in order that completely frivolous lawsuits will be averted. There must be a practical separation of the meritorious sheep from the capricious goats—a recognition that *cucullus non facit monachum.* However, responsible federal judges will be able to discern a case in which there is injury in fact, a sufficient adversary interest to constitute a case or controversy under Article III, and an otherwise reviewable subject matter to prevent dockets from becoming overcrowded. The court should have discretion to grant standing, provided the other criteria listed above are properly met.
>
> "The spectre of opening a Pandora's box of litigation has always seemed groundless to us, particularly in the area of standing to sue. . . ." (424 F.2d at 872).

In attempting to distinguish other cases contrary to its position, the Ninth Circuit raises a host of other subsidiary conflicts and incongruities. For example:

1. The Ninth Circuit attempts to distinguish *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2d Cir. 1965) on the grounds that the "aggrieved" language in § 313(b) of the Federal Power Act provides a statutory aid to standing. But *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97, 104 (2d Cir. 1970), makes it clear that the Second Circuit has now concluded that the "adversely affected or aggrieved" language in the Administrative Procedure Act (5 U.S.C. § 702) is sufficient to confer standing *without* further "statutory aid." Cf. *Scanwell Laboratories, Inc. v. Shaffer,* 424 F.2d 859, 872 (D.C. Cir. 1970).

2. The Ninth Circuit attempts to distinguish *United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1966) on the ground that the broadcast listeners were "consumers." It fails to show why the Sierra Club members and other recreational users for whom it often speaks are not equally "consumers" of unspoiled, undeveloped natural beauty as suggested by *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970).

3. The Ninth Circuit attempts to distinguish *Powelton Civic Home Owners Association v. Department of HUD,* 284 F.Supp. 809 (E.D. Pa. 1968) on the grounds that in *Powelton* the parties with standing were parties to be displaced by the urban redevelopment, while the Sierra Club has failed to show that it has property in Mineral King which is about to be demolished. That is certainly an extraordinary argument in view of the fact that Mineral King is almost completely unpopulated at this time, and that the Sierra Club is objecting to development of the area, at least along the line proposed by

the Disney corporation. As pointed out in *Shannon v. Department of HUD,* 305 F.Supp. 205, 208-209 (E.D. Pa. 1969), it is the people in the *neighboring* area, not the people displaced by the urban renewal project, who have standing to contest the purpose to which the redevelopment area is put. The people who have been dispossessed have little interest, if any, in the land once they have been cleared off and forced to move elsewhere. In the case at bar, the major parties likely to object to Mineral King are somewhere else. Cf. *Baker v. Carr,* 369 U.S. 186 (1962). Almost by definition, conservation cases arise in circumstances in which the threatened land is *not* heavily populated, and the question is whether it should be. To restrict standing to the residents of the area is to restrict it to almost no one.

4. The Ninth Circuit attempts to dispose of *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970) as a "competitor's suit." That it was. But so, in a very practical sense, is the case at bar. As the Ninth Circuit is at pains to point out, the Far West Ski Association supports the action taken by respondent Secretaries. The interests of the skiers doubtless compete with those of the Sierra Club in this case. So, too, do the interests of the Secretaries in maximizing profit from particular lands under their stewardship compete with the Congressional concern for the preservation of a priceless national heritage of unspoiled scenic splendor. The Ninth Circuit must mean, when it concedes standing in a "competitor's suit", that the competition must be commercial—i.e. that the plaintiff's interest must be pecuniary. But the *Data Processing* case, *supra,* laid

that idea to rest when it included "aesthetic, conservational and recreational" interests among those which a private organization has standing to assert.

In the conservation field, standing is a concept of crucial significance. If left unreversed, this case will cripple the efforts of conservation groups to represent the public interest in forcing federal officials to adhere to the Congressional mandates under which they purport to function.

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2. THE STANDARD FOR PRELIMINARY INJUNCTION APPLIED BY THE NINTH CIRCUIT CONFLICTS WITH THAT OF OTHER CIRCUITS.

The Ninth Circuit decided that the Sierra Club was required to show a "reasonable certainty" that it would prevail in order to justify a preliminary injunction. It held that the District Court abused its discretion by not adhering to that standard. This holding created a direct conflict with other circuits.

In support of the "reasonable certainty" test, the Ninth Circuit cited *H. E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13 (2d Cir. 1963), *Garlock, Inc. v. United Seal, Inc.*, 404 F.2d 256 (6th Cir. 1968), which echoed *H. E. Fletcher, supra,* and *Hall Signal Co. v. General Ry. Signal Co.*, 153 F. 907 (2d Cir. 1907). Describing petitioner's burden as "persuasive demonstration", it also cited *District 50, United Mine Workers v. International U., U.M.W.*, 412 F.2d 165 (D.C. Cir. 1969) and *Udall v. D. C. Transit System, Inc.*, 404 F.2d 1358 (D. C. Cir. 1968).

It failed to cite the leading case of *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953) in which Judge Frank said

> "To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." (206 F.2d at 740).

The fact that other circuits are in conflict with the Ninth Circuit is established in *Unicon Management Corp. v. Koppers Co.*, 366 F.2d 199 (2d Cir. 1966). In that case, the Second Circuit states:

> "We reaffirm our holding in H. E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13, 17 (2 Cir. 1963), that the party seeking a preliminary injunction has a 'burden of convincing [the court] "with reasonable certainty" that it "must succeed at final hearing." Hall Signal Co. v. General R. Signal Co., 153 F. 907, 908 (2 Cir. 1907," *where, as there, it appears that a 'lack of adequate showing of irreparable damage' also exists.* But we do not think that what was said in *Fletcher* is a departure from the more generally accepted statement of the rule that 'it will ordinarily be enough that the plaintiff [defendant here] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation,' where, as here, 'the balance of hardships' tips decidedly toward the party requesting the

> temporary relief. Hamilton Watch Co. v. Benrus Watch Co., supra, 206 F.2d at 470. The likelihood of success is 'merely one strong factor to be weighed along with the comparative injuries of the parties.' 3 Barron & Holtzoff, Federal Practice & Procedure § 1433, at 493 (1958)." (*Id* at 204, 205) (emphasis added)

This case makes clear that where, as in the matter at bar, irreparable harm is imminent, the *H. E. Fletcher* and *Hall* test is inapplicable. Also inapplicable is the similar "convincing presentation" test. *District 50, United Mine Workers v. International U., U.M.W., supra,* following *Udall v. D. C. Transit System, Inc., supra,* cites the *Unicon* decision with approval and imposes the strict proof requirement because "the showing of irreparable harm is weak." (412 F.2d at 168). *Udall* was a case similarly devoid of a showing of irreparable harm.

The issues in each case must be:

(1) Have serious questions of illegality been raised which go to the merits, and

(2) Is there an imminent threat of irreparable harm which a preliminary injunction would forestall?

The District Court answered "yes" on both issues.

Subsequent sections of this petition include the serious questions of legality which were raised by the Sierra Club along with the treatment of those questions by the Ninth Circuit. Concerning the other issue, that court was content to say, without explantation, that there has been no showing that the Sierra Club "or anyone else will suffer irreparable injury" (App. A, p. 27).

The District Court found an imminent threat of irreparable injury. It received preliminary evidence of the effects of the plans which the grant of permits by the Secretaries would set in motion. That evidence included several internal memoranda of the Forest Service, one of which stated that:

> "The total basic concept of development appears badly biased in orientation toward a highly artificial, continued situation, without any real attention to ecological factors and needs to multiple use management. The extent and nature of proposed alteration of the basin is unacceptable to us—the damages extend beyond effects on fish and wildlife, and these alone are critical" (R. 174).

The evidence also included a study by Dr. Richard J. Hartesveldt concerning the effects of the new highway upon the ecology of sequoia groves within the Park in which he said that

> ". . . there are a total of at least 103 giant sequoias below the proposed highway. Of these, 45 are in a position of possible jeopardy because of road construction" (R. 128).

It is only necessary to envision the effects of extensive bulldozing and blasting, stream diversion, avalanche dams and the grooming and manicuring of slopes to understand that if the District Court had permitted all of this to proceed, later proof that it had been done illegally would have been of no value.

Finally, the District Court found that Interior was ready to issue a permit to the State to build the highway which would automatically trigger issuance of the Forest

Service permits. Thus, the *status quo* was about to be changed dramatically.

The Court carefully tailored the preliminary injunction so that it did not interfere with activities connected with planning. It barred only physical disturbance of the Park and Game Refuge.

We submit that, having identified the proper tests for preliminary injunction, the District Court properly applied them; further, that use of an improper standard led the Ninth Circuit into error in assessing each of the grounds upon which the injunction was granted.

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3. THE NINTH CIRCUIT'S DECISION HAS REPEALED THE STATUTE LIMITING THE SIZE OF DEVELOPMENTS IN NATIONAL FORESTS.

In 16 U.S.C. §497, Congress authorized the Secretary of Agriculture to permit the use of parcels of not more than 80 acres of national forest land for periods not exceeding thirty years for recreation.

The District Court reviewed this statute and its legislative history, and found an unambiguous Congressional intention to limit the size of long term recreational developments within national forests. The Ninth Circuit did not challenge this finding.

The District Court also construed 16 U.S.C. §551, under which the Secretary may regulate the occupancy and use of the national forests. It held that, under that section, the Secretary may not issue a permit such as the supplementary permit proposed in this matter which is not in

terms and in fact revocable at will. The Ninth Circuit disagreed and, in so doing, erred.

That Disney intends to locate permanent facilities including ski lifts and towers, sewage treatment facilities and parking structures on lands outside those covered by the 80-acre term permit is not disputed. Disney plans to locate these major, permanent improvements on land covered by a separate, supplemental permit covering 13,000 acres (R. 120, 121).

The District Court examined the supplemental permit in conjunction with the regulations which afford appellate review of its termination and found that it did not appear to be revocable at will. The District Court's conclusion was buttressed by the realities of a situation in which revocation of the permit would effectively destroy the value of the facilities covered by the 30-year term permit and, thereby, the entire 35 million dollar investment contemplated by Disney.

The Ninth Circuit apparently acknowledged that the supplementary permit is *not* revocable at will, but suggested that it need not be. This suggestion is at the heart of the Ninth Circuit's decision reversing the District Court. The decision has the effect of repealing 16 U.S.C. §497; it is at odds with Article IV, Section 3, clause 2 of the United States Constitution which vests exclusive power over public lands in the Congress; and it is in conflict with relevant opinions of the Attorney General.

The Ninth Circuit rejected an opinion of the Attorney General which had been cited to the District Court by the Secretary of Agriculture (35 Op. Atty. Gen. 485 (1928)), instead placing great reliance upon another At-

torney General's opinion written in 1905, which includes the following statement:

> "The legislation expressly referring to forest reservations is silent with reference to the period for which the permits may be granted, and my attention has not been called to any other statutory provision which can be said to limit your action in this connection." (25 Op. Atty. Gen. 470, 472 (1905)).

The legislative silence which in 1905 permitted the Attorney General to sanction permits which were not revocable at will was ended ten years later when Congress enacted 16 U.S.C. §497. This section established clear limits of power which the Secretary of Agriculture could not circumvent by issuing supplementary permits not truly revocable at will.

While he was the Attorney General, Chief Justice Harlan Fiske Stone was asked to review an agreement between the Secretary of the Navy and a licensee of certain government owned patents. He reviewed the Constitutional limitation upon the disposal of public property, cited authorities for the proposition that disposal includes a lease and stated that

> "No public property can, therefore, be disposed of without the authority of law, either by an express Act of Congress for that purpose, or by giving the authority to some Department of the Government, or subordinate agent." See also *Wisconsin R. Co. v. Price County,* 133 U.S. 496, 504. . . . [t]his prohibition extends to any attempt to alienate a part of the property, or in general, in any manner to limit or restrict the full and exclusive ownership of the United States therein" (34 Op. Atty. Gen. 320, 322 (1924)).

He found that the executive may grant a license, and also the limitations upon that licensing power, as follows:

> "But, as pointed out in 22 Op. 240, 246, the power to issue such revocable licenses, inasmuch as they vest no estate, interest, or franchise and confer no right whatever to the continuance of the permission thereby given, has been habitually exercised as an incident of the power of management and control, whenever, in the Secretary's judgment, the permission will subserve the interests of the Government. In that opinion are collected numerous instances of the granting of such revocable licenses for the use of portions of Government lands, and the opinion itself sustained the issuance of a revocable license * * * to lay a single track on the Aqueduct reservation near Cabin John Bridge.
>
> "Whether * * * the determinable occupancy of the land * * * is or is not a benefit to the Government * * * is a question for the exercise of the judgment of the official vested with the power rather than a question of law to be determined in advance by the law officers of the Government * * *. It being clearly understood that such permission creates no right, interest, or franchise in the license and that, however long continued, *the occupancy is subject in theory and in fact to immediate termination at any time at the will of the Government.* I am of opinion that you have power to issue a revocable license." (Id. at 327, 328.) (Emphasis added.)

This limitation of power applies to all departments of government. Without it there would be no point to the statutes placing limits upon the use of public lands. The pernicious effect of the Ninth Circuit's decision thus transcends the land-use statutes involved in this case.

Reference by the Ninth Circuit to 84 other recreational developments on Forest Service lands in which a combination of term and revocable permits is employed is neither relevant nor convincing proof of the legality of those developments. The record does not show that the other developments are factually or legally comparable.

More importantly, the Circuit Court misconstrues the challenge of the Sierra Club. It does not contend that the Secretary of Agriculture lacks authority to issue fully revocable permits for the use of public lands as part of his overall managerial authority. Nor does it contend that a use may not involve the coupling of term and terminable permits. This was not a finding, or even a premise, of the District Court.

The legality of the actions threatened in this particular case was challenged because, as a matter of law, the supplemental permit would not have been revocable at will. As a matter of fact, it would have been so inexorably tied by money, improvements and use to the thirty year term permit that its own illegal term would have been exactly the same.

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4. THE NINTH CIRCUIT HAS APPROVED USE OF A NATIONAL PARK FOR A NON-PARK PURPOSE

The proposed highway, which would cut a new swath across Sequoia National Park, would connect two points already joined by a substandard road. The Ninth Circuit accepts the new highway because the present road "is legal" and because no authorities have been cited to prove that this should not determine the question.

First, the existing road is neither "legal" nor "illegal" in the sense employed by the Ninth Circuit. The Secretary of the Interior was not called upon to authorize it, since it was in existence when Sequoia National Park was established. It simply was there when the Park was created and it remains.

Second, even if the existing road had been authorized by the Secretary, operating within his authority, that could not determine the legality of every other highway connecting the same points. If this were the law, as suggested by the Ninth Circuit, any number of highways would automatically be legal whatever their route, size or even purpose as long as they had termini in common with the first road.

Third, the authority which the Ninth Circuit should have applied to this matter was 16 U.S.C. §1 which was enacted in 1916 and which permits the Secretary of the Interior "to promote and regulate the use" of parks only

> ". . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which *purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment for future generations.*" (Emphasis added).

Congress has insisted by this law that all changes in National Parks meet the test of serving a park purpose. Every act of the Secretary of the Interior involving the parks must be accompanied by a finding that a park

purpose is served, including acts pursuant to 16 U.S.C. §8 under which he may construct roads and trails.

Interior has not found that the new highway would satisfy a park purpose. The National Park Service has no plan to develop the portion of the Park touched by the highway. (R. 77). Interior Secretary Stewart Udall was pressured to approve it because, while the route across the Park was not the only available avenue, it was the cheapest (R. 106, 107). At a trial on the merits, the Sierra Club expects to prove that Secretary Udall and his subordinates fought long and hard against the road *because* it would not conserve scenery or natural and historic objects and wildlife.

Congress has granted Interior no power to issue permits to *third parties* for construction of a highway in a park. That only the Secretary may construct roads in national parks is reflected in 16 U.S.C. §8, which reads:

> "The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior. Apr. 9, 1924, c. 86, § 1, 43 Stat. 90."

This clear limitation, coupled with the general prohibition against the disposition of public property by the executive where Congress has not expressly authorized it, bars the proposed permit grant to the state.

The new highway would not trace old ecological scars (R. 114, 115). In order to produce a high volume of traffic, the proposed highway must be on a new routing, with new and much larger cuts, fills and structures, all

productive of an adverse effect upon scenery and ecology (R. 185).

The highway would violate Interior's own administrative guidelines because its sole function is to serve as a connecting link. Interior's Park Road Standards Committee put the matter succinctly as follows:

> ". . . Park roads are not continuations of the State and Federal network. *They should neither be designed—nor designated—to serve as connecting links. Motorists should not be routed through park roads to reach ultimate destinations.*" (Park Road Standards, U.S. Department of the Interior, National Park Service, May, 1968.)

Congress has expressed itself on the subject. Referring to a proposed highway across the Padre Island National Seashore which would connect with existing road systems, the House Committee of Interior and Insular Affairs was

> ". . . of the opinion that to require the National Park Service to construct a through highway for general public convenience in the Padre Island National Seashore would give it a function which does not properly belong to it" (1962 U.S. Code Cong. Serv. p. 2717).

The Secretary alone may construct roads in national parks and only those roads which are conceived to serve a park purpose. Here, to satisfy a non-park purpose, he threatened to authorize a third party (the State Division of Highways) to construct a major highway cutting a destructive swath through park land which Congress had designated for preservation in its natural state. The illegality of this plan is clear.

5. INTERIOR, IN FAILING TO CONDUCT HEARINGS, HAS VIOLATED ITS OWN RULES AND ABUSED ITS DISCRETION.

On January 29, 1969, the Secretary of the Interior adopted and published regulations entitled "Roadbuilding in National Parks" (34 Fed. Reg. 19 (January 29, 1969)). These regulations, quoted in relevant part in Appendix C, call for both a corridor and a design public hearing in the case of "each major road project that would have a substantial social, economic, or environmental effect."

When the project involves improvement of an existing road, a single hearing is called for "if the project would have a substantial social, economic, or environmental effect."

The application of these rules to the proposed high-volume road could hardly be clearer. Under them, the Secretary of the Interior would have had no choice but to grant a hearing prior to issuing a permit for its construction. It is an elementary principle of administrative law that an agency must comply with its own regulations and that agency action taken in defiance of its own regulations is invalid without regard to the merits of the decision reached. *SEC. v. Chenery Corp.*, 318 US 80 (1942); cf. *Pacific Molasses Co. v. FTC*, 356 F.2d 386, 387, 389 (5th Cir. 1966).

But the Secretary of the Interior, on April 21, 1969, purportedly revoked the "Roadbuilding in National Parks" regulations, "effective immediately." His "revocation", as published in 34 Fed. Reg. 6985 (April 26, 1969) reads, in its entirety, as follows:

"Office of the Secretary
"ROADBUILDING IN NATIONAL PARKS
"Revocation of Procedures

"Notice is hereby given that the procedures adopted on January 18, 1969, and published in the FEDERAL REGISTER on January 29, 1969, 34 F.R. 1405, regarding the location and design of major road projects in the National Park System administered by the Department of the Interior are revoked, effective immediately.

"Issued in Washington, D.C. on April 21, 1969.

WALTER J. HICKEL,
Secretary of the Interior"

By statutory definition, repealing a rule is just as much "rule making" as formulating it in the first place. (5 U.S.C. § 551(5)). Secretary Hickel's "revocation" is completely inadequate and improper on numerous grounds.

1. It does not give notice of proposed rule-making as required by 5 U.S.C. § 553(b). See also *Pacific Coast European Conference v. United States*, 350 F.2d 197 (9th Cir. 1965);

2. It does not include a statement of the time, place, or nature of public rule-making proceedings as required by 5 U.S.C. §553(b) (1);

3. It does not make a reference to the legal authority under which the rule (revocation) is proposed, as required by 5 U.S.C. §553(b) (2);

4. It completely deprives interested persons of any opportunity to participate in the proposed rule-making in any way, shape or form, in violation of 5 U.S.C. §553(c).

The purported "revocation" of the previous rule governing hearings on park roads was invalid and ineffective. The previous rule remains in effect. The Secretary's failure to comply with his own regulation was a continuing violation of law, arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law within the meaning of 5 U.S.C. §706(2).

The Ninth Circuit dealt with this failure to hold the required hearing only to the extent of finding that "[t]he existence of any such requirement upon the Secretary of Interior or the Secretary of Agriculture is unclear" (App. A, pp. 25, 26). We are asked to be unconcerned because the State of California conducted a hearing in 1967 and the Tulare County Chamber of Commerce held a meeting in 1953 to promote a project.

The 1967 State Division of Highways hearing was not the forum in which to examine limits upon the powers of the Secretary of the Interior, who, at that time, remained adamant in his opposition to the highway (R. 106).

Much less was the Tulare County Chamber of Commerce pep rally of 1953 (R. 83) a hearing in which the purposes of the 1969 regulations of the Secretary of the Interior could be satisfied.

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6. CONGRESS ALONE MAY AUTHORIZE A TRANSMISSION LINE WITHIN SEQUOIA NATIONAL PARK

In dealing with the decision of the District Court, the Ninth Circuit was confronted with the clear language of 16 U.S.C. §45(c) which says that, in Sequoia National Park, Congress must authorize construction of transmis-

sion lines. It sought to avoid the effect of that language by referring to a general section dealing with permit authority for electric poles and lines (16 U.S.C. §5). It found that the Secretary of the Interior may authorize a transmission line in the Park without Congressional action because it was unlikely that it was the "intention to require an act of Congress for each electrical line within the park . . ." (App. A, p. 25).

First, to clear away any spectre that Congress obviously could not have intended to assume the burden of considering each electrical line, the law reads that Congressional authority is necessary not for every *electrical* line but only for a *transmission* line. Second, to read 16 U.S.C. §45(c) is to reject the claim that the only transmission lines which must receive Congressional approval are those connected with hydroelectric facilities in the Park. It says that

> ". . . no permit, license, lease, or authorization for . . . transmission lines . . . *or* for the development, transmission, or utilization of power within the limits of said park . . . shall be granted or made without specific authority of Congress."

If the intention suggested by the Ninth Circuit were correct, the phrase "transmission lines" could have been omitted.

The ruling of the District Court accorded with the clearly expressed intention of Congress and it was error for the Ninth Circuit to rule otherwise.

7. AUTHORIZATION OF DISNEY'S HUGE RESORT IN A NATIONAL GAME REFUGE WAS ILLEGAL

The Ninth Circuit dismissed the contention of the Sierra Club that Mineral King's status as a National Game Refuge prevents its use as the site for an extensive Commercial development. It did so, quoting the first portion of the law through which Congress established the Refuge, but omitting its provisos. The following quotation from the relevant portion of 16 U.S.C. §688, reflects the true intention of Congress:

> "[The lands] *are designated as the Sequoia National Game Refuge,* and the hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of the United States within the limits of said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture: *Provided,* That it is *the purpose of this section to protect from trespass the public lands of the United States and the game animals which may be thereon,* and not to interfere with the operation of the local game laws as affecting private or State lands: *Provided further,* That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto *so far as may be consistent with the purposes for which said game refuge is established.* July 3, 1926, c. 744, § 6, 44 Stat. 821; June 25, 1948, c. 645, § 13, 62 Stat. 861." (16 U.S.C. § 688). (Emphasis added)

No federal official previously has sought to authorize a private construction project including ski lifts, manicured

slopes, hotels and lodges, 10 restaurants, a chapel, convenience specialty shops, conference center, swimming pools, theatre, general store, 5-story parking facility, hospital, sewage treatment plant, housing for 800 employees and 14,000 customers on a National Game Refuge.

California Fish and Game Commission personnel have stated "that in an extensive development such as the Disney proposal, considerable wildlife habitat would be lost and wildlife would suffer from human encroachment." (R. 119).

Agriculture has made no finding that the proposed ski resort is a use consistent with the National Game Refuge. This failure was arbitrary and capricious. Moreover, a finding that Disney's "wonderland" was a use consistent with the purposes for which the Game Refuge was established would have been an abuse of discretion, and more than slightly embarrassing to articulate. Congress intended not only to protect animals but to preserve their *habitat*.

A trial on the merits will show that the migratory cycle of deer and other animals found in and around the Park includes the Mineral King area. Commercial development on the scale threatened and 14,000 persons at one time are not responsive to a Congressional mandate to protect the land from trespass and to maintain it as a *refuge* for game.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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(Appendices Follow)

Appendix A

Corrected October 16, 1970

United States Court of Appeals
For the Ninth Circuit

SIERRA CLUB, a California corporation, *Appellee*, vs. WALTER J. HICKEL, individually, and as Secretary of the Interior of the United States; JOHN S. MCLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest, *Appellants.*	No. 24,966

[September 16, 1970]

Appeal from the United States District Court
for the Northern District of California

Before: HAMLEY, KILKENNY and TRASK,
Circuit Judges.

TRASK, Circuit Judge:

This is an appeal from an order of the district court granting a preliminary injunction. The action was instituted by a verified complaint filed by the Sierra Club, a non-profit California corporation, against Walter J. Hickel, individually, and as Secretary of the Interior, Clifford M. Hardin, individually, and as Secretary of

Agriculture, and the Superintendent of the Sequoia National Park and Supervisor of the Sequoia National Forest.

The relief sought was a declaratory judgment and preliminary and permanent injunctions enjoining issuance of the permits required for implementation of a plan proposed by Walt Disney Productions, Inc., for a large scale commercial-recreational development in and near Mineral King Valley in the Sequoia National Game Refuge located within Sequoia National Forest in California. The development also involved a proposed road which would in part traverse a portion of Sequoia National Park.

Amicus curiae briefs supporting the position of the defendants-appellants were filed by the United States Ski Association, the Far West Ski Association and the County of Tulare.

Jurisdiction of the district court was asserted under Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706; under the Federal Question Statute, 28 U.S.C. § 1331(a); the 1962 Mandamus Act, 28 U.S.C. § 1361; and under the Declaratory Judgments Act, 28 U.S.C. § 2201. Jurisdiction of this court rests on 28 U.S.C. § 1292(a)(1) authorizing interlocutory appeals from orders granting injunctions.

A brief summary of the controversy is as follows: In February 1965, the Forest Service of the Department of Agriculture published a prospectus inviting interested parties to submit proposals for the development of an all-year recreational project in Mineral King Valley in the Sequoia National Forest, in accordance with certain minimum requirements as established by the prospectus.

Walt Disney Productions (Disney) and five other bidders submitted proposals in response to the prospectus. After careful study the Secretary of Agriculture determined the Disney proposal to be the best. Thereafter, on October 10, 1966, a special use permit for planning was issued to Disney for a term of three years in order to enable Disney to make the necessary studies to prepare a master plan for the project which would meet with Forest Service approval. The plan was duly submitted and approved by the Forest Service on January 21, 1969, and is the plan that is the subject of this litigation.

In connection with the plan the Department of the Interior has proposed to permit the State of California to construct a new access road to Mineral King Valley. The new highway would be 20.4 miles long, of which 6.5 miles would cross Bureau of Land Management (Department of Interior) land, 9.2 miles would cross Sequoia National Park (Department of Interior) land, 1.8 miles would cross Sequoia National Forest (Department of Agriculture) lands, and the remaining 2.9 miles would cross various parcels of private property. It would approximately parallel the existing Mineral King roadway which appears on the map (See Record, 115) to be a tortuous road now described as substandard. In connection with the project, the Secretary of the Interior also agreed to grant a right of way for electrical transmission lines through the park.

In announcing the master plan and its approval, the Forest Service stated:

> "Our goal is to provide a needed public service so that the scenic, aesthetic, and recreational resources

> of Mineral King can be enjoyed by the American people as part of their heritage. At the same time, we intend to work with the Disney organization to assure that the development can be accomplished without substantial impairment or permanent undesirable ecological impact. We are confident that these twin challenges have been faced in a creative and artistic fashion." (T.R. 52.)

The initial description of the facilities proposed stated that accommodations would be provided for 1,505 overnight guests plus day visitors. A sub-level automobile reception center would be provided outside of the main Mineral King Valley with a cog-assist railway to transport people to the main village. No visitor automobiles would be allowed in Mineral King Valley proper. The announcement of the Forest Service continued:

> "While the Mineral King area is certain to become increasingly popular, its ultimate development will be guided by aesthetic and ecological limitations, rather than market potential. The Disney master plan has been designed with this consideration uppermost."

On the merits, the Sierra Club contends that the Secretary of Agriculture who has the responsibility under Congress for management of the national forests has exceeded his authority and has acted illegally as well as arbitrarily and capriciously in approving the master plan proposed by Disney. It urges that the Secretary of Agriculture's proposal to issue a term permit for an eighty acre parcel for a term of thirty years for construction of improvements such as hotels, pools and parking lots, and to issue a revocable permit for additional acreage upon which

such improvements as ski lifts, trails, and sewage treatment facilities would be built, would constitute illegal action in excess of authority. Second, the Sierra Club asserts that the action of the Secretary of the Interior in his proposal to permit the State of California to construct a road across Sequoia National Park for a distance of 9.2 miles to replace an existing road across the park would be illegal. Finally, the club asserts that no authority exists for the Secretary of the Interior to issue a permit for the construction of a transmission line across the park lands as a part of the master plan.

Encompassing all is the vehement argument of Sierra that the necessary result of the development proposal is the "permanent destruction of natural values" and the "irreparable harm to the public interest." These, it is asserted, are "irreversible effects of administrative lawlessness."

Article IV, Section 3 of The United States Constitution commits the management and control of the lands of the United States to Congress. That congressional power is unlimited. The Supreme Court said in *Gibson v. Chouteau,* 80 U.S. (13 Wall.) 92, 99 (1872):

> "With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations."

See also *Alabama v. Texas,* 347 U.S. 272, 274 (1954).

Congress may delegate the power to manage federal lands to the Executive. *Best v. Humboldt Placer Mining Co.,* 371 U.S. 334, 336-338 (1963). With respect to the national forests, Congress has authorized the Secretary

of Agriculture "to regulate their occupancy and use." Organic Administration Act, 16 U.S.C. § 551. With respect to national parks, Congress has authorized the Secretary of the Interior "to promote and regulate the use" of such parks, to "grant privileges, leases, and permits for the use of land" in the parks, and to cooperate with the Secretary of Agriculture in administering contiguous national forests. Organic Act of the National Park Service, as amended, 16 U.S.C. § 1, *et seq.*

The Secretaries purport to act pursuant to these basic sources of authority, together with supplemental legislative support.

(1) *Standing*

Appellants have raised the threshold question as to whether appellee has sufficient legal standing to bring this action. There is no dispute that Sierra Club is a legally organized and existing corporation. If an interest of such a corporate person, entitled to legal protection, is damaged or denied, that corporation is entitled to redress in the courts.

> "The only problems about standing should be what interests deserve protection against injury, and what should be enough to constitute an injury."[1]

Simply stated but difficult to apply, standing has been called "one of the most amorphous concepts in the entire domain of the public law."[2]

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[1]Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 468 (1970).

[2]*Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 861 (D.C. Cir. 1970).

The basic concept of standing was summarized in *Associated Industries v. Ickes,* 134 F. 2d 694, 700 (2d. Cir. 1943) as follows:

> "In a suit in a federal court by a citizen against a government officer, complaining of alleged past or threatened future unlawful conduct by the defendant, there is no justiciable 'controversy,' without which under Article III, § 2 of the Constitution, the court has no jurisdiction, unless the citizen shows that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen; such invaded interests must be either of a 'recognized' character, at 'common law' or a substantive private legally protected interest created by statute."

In that same case, in order to reconcile previous decisions of the Supreme Court where an individual was permitted to assert a position which appeared to protect a public interest rather than a traditional, substantive legally-protected interest of a citizen-plaintiff, the court suggested the "private Attorney Generals" theory, as follows:

> "While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public

> or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then in like manner there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals." 134 F. 2d at 704.

Such a notion would support the rationale of many cases, but not all. More recently, the amendment to the Administrative Procedure Act, and particularly Section 10, thereof, 5 U.S.C. §§ 701-706, together with a profusion of cases relying upon it and interpreting it, have developed new precedents on the law of standing. See, e.g., *Barlow v. Collins,* 397 U.S. 159 (1970); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970); *Flast v. Cohen,* 392 U.S. 83 (1968); *Citizens Committee for Hudson Valley v. Volpe,* 425 F. 2d 97 (2d. Cir. 1970); *Scanwell Laboratories, Inc. v. Shaffer,* 424 F. 2d 859 (D.C. Cir. 1970). See also Davis, *The Liberalized Law of Standing,* U. Chi.L.Rev. 450 (1970).

Turning to the facts of this case to determine whether plaintiff-appellee has standing, the Sierra Club in its complaint alleges that it is a non-profit corporation under the laws of the State of California. It claims a membership of approximately 78,000 nationally, with approximately 27,000 members residing in the San Francisco Bay

Area. It asserts that it has for many years taken a special interest in the conservation and sound maintenance of the national parks and forests and particularly lands on the slopes of the Sierra Nevada mountains. It states that "its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants as hereinafter more fully appears."

Up to this point there is no adversary position stated between the Sierra Club and the Secretary of Agriculture or the Secretary of the Interior. Not only do the latter have a special "interest" in the national parks and forests but they are charged by Congress pursuant to a constitutional mandate with the direct responsibility for the protection and conservation of the national parks and forests.

The club's complaint continues by outlining the recreational development proposal which constitutes the substance of its grievance. It concludes by particularizing the acts of the Secretaries which it asserts are in excess of statutory jurisdiction, are arbitrary and capricious and constitute an abuse of discretion. The proposed development and the permits to authorize it are alleged to be: (1) in violation of the statute limiting the size, terms and manner of occupation of lands for resorts and associated facilities; (2) in violation of the permit power of the Secretary of Agriculture; (3) beyond the jurisdiction of the defendants as to the National Game Refuge. In a second claim for relief the complaint asserts that a proposed highway will be built which will cross 9.2 miles of Sequoia National Park and that the authorization of this roadway is in excess of authority. In its brief the appellee complains of the proposed construction of a transmission line

within the park although this is not asserted in the complaint. The complainant does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened. Certainly it has an "interest" in the sense that the proposed course of action indicated by the Secretaries does not please its officers and board of directors and through them all or a substantial number of its members. It would prefer some other type of action or none at all. On the other hand, the United States Ski Association, the Far West Ski Association claiming 109,000 supporters, and the County of Tulare in which the development will be located, favor the action.

We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all of the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority.

The district court relied on four cases to support its position that the Sierra Club had standing. They are *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F. 2d 608 (2d. Cir. 1965), *cert. denied*, 384 U.S. 941 (1966); *United Church of Christ v. F.C.C.*, (123 U.S. App. D.C. 328), 359 F. 2d 994 (D.C. Cir. 1966); *Road Review League v. Boyd*, 270 F. Supp. 650, 661 (S.D. N.Y. 1967), and *Powelton Civic Home Owners Association v. Department of H. & U. Dev.* 284 F. Supp. 809, 825-28 (E.D. Pa. 1968).

The *Scenic Hudson* case involved a petition to set aside a license to Consolidated Edison of New York to con-

struct a pumped storage hydro-electric project on the west side of the Hudson River at Storm King Mountain. The petitioners were three towns and the Scenic Hudson Preservation Conference—an association of conservationist organizations. The license was issued by the Federal Power Commission after hearings under the provisions of the Federal Power Act in which petitioners participated as parties. Section 313(b) of the Act specifically grants to a party aggrieved by an order of the commission the right of review by the United States courts of appeals. There is no such statute involved in the present case to give standing.

In addition, the Second Circuit pointed out that several of the petitioners had sufficient actual economic interest to support their standing to obtain review. 354 F. 2d at 616-17. No such showing has been made in the present case.

The *United Church of Christ* case, *supra,* was one of a number of consumer cases. There the F.C.C. had denied to petitioners the right to intervene and, as listeners to the programming of a radio and television station to present their views in a proceeding to renew the license of that station. In that case as in other consumer cases, the court pointed out that the listeners were the persons "affected" or "aggrieved." They had standing in the same sense coal consumers were found to have standing to review a minimum price order[3] or that a transit rider had standing to appeal a fare increase.[4]

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[3] *Associated Industries v. Ickes,* 134 F. 2d 694 (2d Cir. 1943).

[4] *Bebchick v. Public Utilities Commission,* 287 F. 2d 337 (D.C. Cir. 1961).

Road Review League, supra, was a complaint to review and set aside an order of the Federal Highway Administrator establishing the alignment of an interstate highway. The plaintiffs were persons and organizations who would be directly affected by the proposed road including persons whose property would be taken. This identification of the plaintiffs is itself a statement of the distinction between that case and the one under consideration. *Powelton Civic Home Owners Association v. Department of H. & U. Dev., supra,* is the final case relied upon by the trial court. We consider it inapposite. It involved the location of an urban development project. The plaintiffs were persons whose homes and properties would be taken to implement the project. The court stated:

> "However, we are of the opinion that the plaintiffs also have standing in the more traditional sense: they have substantive legal rights conferred by the National Housing Act. They have private individual legal rights; and they are the appropriate representatives of legal rights conferred by the Housing Act on the general public." 284 F. Supp. at 821.

The *Powelton* case would be in point if the homes of residents at Mineral King were to be razed and those homeowners objected. There is no such showing.

On this appeal appellee does not limit itself to the four cases cited by the district court in support of its standing to sue. It calls attention to the recent cases decided by the Supreme Court and by the lower courts. We have examined each of these cases and others not cited, but fail to be convinced that any of them go so far as to support the standing claim here. We are not unmindful

of the Supreme Court's recent opinion in *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970), which was an action by plaintiffs, who sold data processing services to business generally, against the Comptroller of the Currency who had ruled that national banks could make their data processing services available to other banks and to bank customers. It was thus a competitor's suit and so designated by the Court. The first question to be asked by the Court was whether the Comptroller's action had caused injury in fact to the petitioners. The answer was that there was no doubt but that such injury existed or would develop in the future because the competition would entail loss of profits. Here, therefore, there was direct injury in fact, and therefore there was standing. The Court went beyond these facts in its discussion of standing generally and the effect of the Administrative Procedure Act in particular. It said that aside from the case or controversy test, standing is concerned with the question:

> "Whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153.

The significance of the language is not entirely clear. It is likewise not made clear in a companion case decided the same day and involving the same question.[5] We submit that it does not establish a test separate and apart from or in addition to the test which the Court first looked to in *Camp:*

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[5] *Barlow v. Collins,* 397 U.S. 159 (1970). See discussion of both cases in Davis, *supra.*

> "The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise. There can be no doubt but that petitioners have satisfied this test. The petitioners not only allege that competition by national banks in the business of providing data processing services might entail some future loss of profits for the petitioners, they also allege that respondent American National Bank & Trust Company was performing or preparing to perform such services for two customers for whom petitioner Data Systems, Inc., had previously agreed or negotiated to perform such services." 397 U.S. at 152.

This is the test which will reconcile most if not all of the decided cases and also fit the standard of the Administrative Procedure Act. "Standing to sue," as the phrase indicates, refers to the posture of the plaintiff and not to the "legal interests" to be unravelled. The Court said in *Jenkins v. McKeithen,* 395 U.S. 411, 423 (1969):

> "In this sense, the concept of standing focuses on the party seeking relief, rather than on the precise nature of the relief sought. See *Flast v. Cohen, supra,* at 99-100. The decisions of this Court have also made it clear that something more than an 'adversary interest' is necessary to confer standing. There must in addition be some connection between the official action challenged and some legally protected interest of the party challenging that action. See *Flast v. Cohen, supra,* at 100-106."

Nor does the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and particularly Section 702, aid the appellee

here.[6] Judge Burger, now Mr. Chief Justice Burger, in a concurring opinion in *National Association of Securities Dealers, Inc. v. SEC,* 420 F. 2d 83, 101 (D.C. Cir. 1969), *cert. granted,* 397 U.S. 986 (1970), commented that the above section broadened the basis of standing, as follows:

> "Appellees also assert that § 702(a) (Supp. II, 1967), embodies an independent and self-sufficient statutory basis for standing. I do not feel that the APA was meant to arrest the development of the law of standing as of the date of its passage:
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> '[W]e would certainly be prepared to hold in an appropriate case that one who complains of administrative action may find a remedy under the Act beyond the strict scope of judicial review recognized prior to its adoption. . . .'
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> "Kansas City Power & Light Co. v. McKay, 96 U.S. App. DC. 273, 282, 225 F.2d 924, 933, *cert. denied,* 350 U.S. 884 (1955). *Nevertheless, although the review provisions of the APA were not meant to retard the judicial development and adaptation of the law of standing, it does not establish an independent right to review absent judicially articulated notions of 'legal wrong' of 'adversely affected or aggrieved . . . within the meaning of any relevant statute.'* See Pennsylvania R.R. Co. v. Dillon, *supra* note 2." 420 F.2d at 104 n.5. (*Emphasis supplied*).

In almost every carefully-considered case where standing is sustained it is apparent in the facts or in the opinion that when the situation of the plaintiff is examined there is an element of legal wrong being afflicted upon

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[6] "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702.

him or he is adversely affected by agency action or aggrieved within the meaning of a relevant statue.[7] That adverse effect, of course, need not be economic but, as the Supreme Court has recently observed, may be aesthetic, conservational or recreational. *Data Processing, supra,* 397 U.S. at 154. It is this element which appellee fails to sufficiently allege in its complaint and support by its exhibits attached. It does not allege that it is "aggrieved" or that it is "adversely affected" within the meaning of the rules of standing.[8] Nor does the fact that no one else appears on the scene who is in fact aggrieved and is willing or desirous of taking up the cudgels create a right in appellee. The right to sue does not inure to one who does not possess it, simply because there is no one else willing and able to assert it.

We do not believe that the Sierra Club's complaint alleges that it or its members possess a sufficient interest for standing to be conferred. There is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them.

In holding that the complaint fails to allege that the Club has the requisite standing to institute this action, we are aware that federal courts have accorded the Club standing to object to alleged administrative infringement upon natural resources in two recent cases: *Citizens Com-*

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[7]Davis, *supra* at 466. See also *South Hill Neighborhood Assn. v. Romney,* 421 F. 2d 454 (6th Cir. 1969), *cert. denied,* 397 U.S. 1025 (1970).

[8]"Aggrieved" is defined as "Having suffered loss or injury; damnified; injured." Black's Law Dictionary 87 (4th ed. 1968).

mittee for the Hudson Valley v. Volpe, 425 F.2d 97, (2nd. Cir. 1970) and *Parker v. United States,* 307 F. Supp. 685 (D. Colo. 1969). In both of these cases, however, the Sierra Club was joined by local conservationist organizations made up of local residents and users of the area affected by the administrative action. No such persons or organizations with a direct and obvious interest have joined as plaintiffs in this action.[9] The question of standing here must be decided from the facts in this action. We hold that they do not establish the interest necessary for that purpose.

(2) *The merits*

Apart from questions of standing, an order granting a preliminary injunction must be based upon established equitable grounds. "The grant of a preliminary injunction is the exercise of a very far reaching power never to be indulged except in a case clearly warranting it." *Dymo Industries, Inc. v. Tapeprinter, Inc.,* 326 F.2d 141, 143 (9th Cir. 1964). In order to obtain such relief, particularly against the discretionary action of an official of cabinet rank, the plaintiff must establish a strong likelihood or "reasonable certainty" that he will prevail on the merits at a final hearing. *Garlock, Inc. v. United Seal, Inc.,* 404

[9]To the extent to which *Citizens Committee for Hudson Valley v. Volpe,* indicates that the Sierra Club has standing within the "private Attorney Generals" rule, we respectfully disagree. We believe that rule is limited as it states to cases where Congress has enacted a statute "conferring on any non-official person, or on a group of non-official persons, authority to bring a suit" to prevent unauthorized official action. See, *Scanwell Laboratories, Inc. v. Shaffer,* 424 F. 2d at 864. We find no indication in any federal statute that Congress has "conferred" on the Sierra Club or any group like it, authority to bring suits to challenge official action.

F.2d 256, 257 (6th Cir. 1968); *H. E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13, 17 (2d Cir. 1963).

> "It is a cardinal principle of equity jurisprudence that a preliminary injunction shall not issue in a doubtful case. Unless the court be convinced with reasonable certainty that the complainant must succeed at final hearing the writ should be denied." *Hall Signal Co. v. General Ry. Signal Co.*, 153 F. 907, 908 (2d Cir. 1907).

In addition, before such a writ should issue, the applicant must show that it will suffer irreparable injury. The court must balance the damage to both parties. *Dorfmann v. Boozer*, 414 F.2d 1168, 1173 (D.C. Cir. 1969). The injunction must rest upon a convincing presentation and, because of this, an appellate court may reverse an order granting a preliminary injunction where the appellee's showing is something less than the persuasive demonstration upon which an injunction must be predicated. *District 50 UMW v. International Union, UMW*, 412 F.2d 165, 167 (D.C. Cir. 1969); *Udall v. D.C. Transit System, Inc.*, 404 F.2d 1358, 1360-61 (D.C. Cir. 1968). As will appear, the appellee herein has shown neither a reasonable certainty that it will prevail nor irreparable injury.

We recognize that in appraising these issues, even upon a preliminary basis, our function is not to make an original judgment or to make a final decision on the merits. See, e.g., *Public Service Commission of Wisconsin v. Wisconsin Telephone Co.*, 289 U.S. 67, 70 (1933); *Industrial Bank of Washington v. Tobriner*, 132 U.S. App. D.C. 56, 405 F.2d 1321, 1324 (D.C. Cir. 1968). The district court has done this. The function of this court on appeal is

to determine whether in that original preliminary injunction there has been an abuse of sound discretion of the district court. *Washington Capitols Basketball Club Inc. v. Barry,* 419 F.2d 472, 475 (9th Cir. 1969); *Ross Whitney Corp. v. Smith Kline & French Labs.,* 207 F.2d 190, 194 (9th Cir. 1953).

The district court has first considered the development in the light of the permits which are to be issued by the Secretary of Agriculture and has concluded that it "may involve a violation not only of the letter, but also the purpose and intent" of the applicable law. The court directed its attention particularly to the use by the Secretary of his authority to issue permits to accomplish the objectives sought. Examining the same documentation in the light of the established practices of the Secretary, we respectfully come to a different conclusion.

The proposal of Disney and the action taken by the Secretary is to permit a land use of forest lands by the issuance of two types of permits. The first type is a term permit for an aggregate of eighty acres with a maximum term of thirty years. The second is called a "revocable permit", meaning the Secretary imposes no limitation on time or acreage.

The district court has concluded that Congress has never expressly authorized revocable permits and that the only authority to issue them is under the general power to regulate the forests and under a 1928 Attorney General's opinion. Upon such a tenuous base, the broad application which is proposed here becomes questionable to the lower court. We find the Secretary's authority rests upon much firmer ground.

Originally the management of the lands reserved for national forests was under the supervision of the Secretary of the Interior. In 1905 these powers were transferred to the Secretary of Agriculture,[10] and he was given authority to make rules and regulations to preserve the forests from destruction.[11] As early as May 31, 1905, the Secretary of Agriculture was advised by the Attorney General that he had the authority to issue revocable permits.[12]

This permit authority under the Secretary's general regulatory power was upheld by the Supreme Court in *United States v. Grimaud,* 220 U.S. 506 (1911). At the time of the amendment of 16 U.S.C. § 497 in 1956 to authorize the issuance of term permits for eighty acres for thirty years, the House Report commented on the practice of the Secretary to issue revocable permits under his general regulatory powers, saying:

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[10]Act of Feb. 1, 1905, Ch. 288, 33 Stat. 628.

[11]Act of June 4, 1897, 30 Stat. 35.

[12]An application for a permit to occupy forest lands for use in conducting a fish salter, oil and fertilizer plant was made to the Secretary. He requested an opinion from the Attorney General as to his authority. Replied the Attorney General:

> "It would therefore seem that when, in the exercise of that discretion, you determine that the granting of a permit to use and occupy a reservation for a specified purpose is consistent, according to your judgment, with insuring the objects for which the reservation was created, then your decision in the premises is definitive and subject to review in no other way than by the Congress from which your power to act was derived. Answering your first question therefore, I have to advise you that, in my opinion, you possess authority to grant a permit for such a purpose as that set forth in the application referred to by you."

In the same opinion, with respect to an inquiry as to the time for which such a permit might be issued, the Attorney General responded ". . . the permits should not be given for a longer period than, under the circumstances of each case would seem reasonable." 25 Op. Att'y Gen. 470, 472 (1905).

"The Department of Agriculture now has adequate authority to issue revocable permits for all purposes under the act of June 4, 1897 (16 U.S.C. 551)." House Report No. 2792, U.S. Code Cong. & Ad. News, p. 3635 (1956).[13]

The court below has understandably relied upon the authority of the opinion of the Attorney General to the Secretary of War, 35 Op. Atty. Gen. 485 (1928). That opinion is the basis for the court's discussion of the necessity that a revocable permit be terminable "at will" and that therefor *this* permit is not properly issued. We have found no such limitation apart from this Attorney General's opinion. The same erroneous premise results in the district court's concern about the removability of any improvements placed upon the land covered by the revocable permit. It is at the bottom of the district court's conclusion that a combination of a term permit and a revoc-

[13]The district court has cited and relies upon an opinion of the Attorney General in 1928 as one which "narrowly" restricts the implied power of the Secretary of Agriculture to issue revocable permits. 35 Op. Att'y Gen. 485 (1928). This opinion for some inexplicable reason was cited to the district court by the defendants. It had nothing to do with the authority of the Secretary of Agriculture under the statute granting him power over the forests. It was an opinion addressed to the Secretary of War in answer to an inquiry as to whether the Secretary of War had the authority to grant to the Southern Pacific Railroad Co. a permit to construct a railroad line across a portion of a California military reservation. The Attorney General pointed out that the Secretary of War had no power to grant any permanent estate for railroad purposes and no express statutory authority to grant revocable licenses or permits. The opinion also pointed out a long administrative practice in granting some revocable permits and then in the guarded language quoted by the trial court below, opined that in very limited circumstances such a revocable permit might be granted. Counsel for the Secretary of Agriculture apparently cited this opinion for lack of one directly in point. It need not have done so. As the district court pointed out, the opinion adds nothing to the Secretary's case.

able permit may be an impermissible and unlawful exercise of administrative authority. Beginning from a correct premise that the revocable permit is an approved device for forest management under Congressional mandate from the Attorney General, the Supreme Court and the Congress, we believe an entirely different conclusion would have been reached. The fact that the record discloses that there are now a total of at least eighty-four recreational developments on national forest lands in which there is such a combination of the term permit and the revocable permit is convincing proof of their legality.[14] Many of these developments are ski developments making use of maximum acres of the term permit plus revocable permits for additional acreage in amounts in some cases in excess of 6,000 acres. See the United States Forest Service tabulation in Appendix, Brief of Amicus Curiae Ski Association. It seems apparent, as was obvious to both Senate and House Committees, that the eighty-acre long-term permit was a necessity to obtain proper financing for substantial permanent improvements, while developments of less magnitude and permanency, such as trails, slopes, corrals, could be placed upon lands held under revocable permits.[15] We find no indication in those reports that ski lifts are limited to the term permits. The planned development in the instant case discloses that most major improvements are to be located upon lands held under the eighty-acre term permits while lifts and trails will be in-

[14]Affidavit of W. S. Davis, Assistant Regional Forester, California Region, Record p. 238. See *Udall v. Tallman*, 380 U.S. 1 (1965), which holds that great deference must be given to interpretations of statutes of officers or agencies charged with their administration.

[15]See Senate Report No. 2511, Record p. 298; House Report No. 2792, Record p. 293.

stalled "throughout about 13,000 acres."[16] Evidence of great concern for the ecology of the area and the preservation and conservation of natural beauty and environmental features appears throughout the planning reports attached as exhibits. We find little or no liklihood of success in opposing the proposed development upon the ground that there would be an illegal use of term and revocable permits.

A. *Permit for Highway*

The district court next discusses the proposal of the Secretary of Interior to issue a permit to the State of California to construct a segment of roadway through the national park. The road proposed is one from an existing state highway (Cal. 198) to Mineral King. No cases have been cited to illustrate the alleged impropriety of this permit to cross 9.2 miles of national park lands in the twenty mile route from Three Rivers to Mineral King. We know of none. In fact, there is an existing road from Three Rivers to Mineral King which traverses the same park. That road is a narrow substandard roadway with sharp switchbacks rising from an elevation of 1,160 feet at its junction with Route 198 to an elevation of 7,830 feet at Mineral King. Most of it has oiled surface with a portion graded only. It does not qualify for state maintenance (Record 101). The proposed road follows the alignment of the old road to some extent and substantially parallels it in others. The record shows a great deal of concern in its planning for preservation of aesthetic and

[16]The gross acreage of Sequoia National Forest is 1,178,767 acres, which does not include areas within Sequoia National Park or King's Canyon National Park.

ecological values. The defendant Superintendent of the National Park concerned has stated under oath that the construction will be engineered.

> ". . . so that there will be a minimum impact on the national park values. The alignment of the road will be carefully selected to protect the Sequoia trees, natural areas, existing drainage ways, and the overall ecology of the area." (Record 251; see also as to Sequoia trees and wild-life, Record p. 103-104.)

No question is raised as to the wide discretion given to the Secretary of the Interior in managing national parks to construct and improve roads and trails therein. See 16 U.S.C. § 8. We know of no law and find little logic in a contention that a twisting, substandard, inadequate road through 9.2 miles of the park is legal but that an improved all weather two lane highway along a new but approximately parallel alignment is illegal. No authorities have been cited in support of such a position. We cannot find in the appellee's contentions concerning this proposed road any degree of substantiality.

B. *Permit for Transmission Line*

Although not alleged in the complaint, appellee has questioned in its brief and the district court has alluded to the proposal of the Secretary of the Interior to grant permission for a right of way for a power line to provide electrical power for uses in connection with the project. Again, with deference, we fail to find this a substantial issue upon which to base the grant of a preliminary injunction. It seems unlikely that the appellee could prevail as to such a contention. Under 16 U.S.C. § 5 authority is

clearly provided to the Department of the Interior in its management of parks to grant permits and easements for rights of way for "electrical poles and lines for the transmission and distribution of electrical power." It is suggested, however, that under 16 U.S.C. § 45 (c) such a permit may not be issued without an act of Congress. This latter section does apply specifically to Sequoia National Park. It recognizes in the first portion of the section, existing valid claims for homesteads, mineral rights or rights for any other purposes whatsoever; it then gives to the Secretary authority to issue permits for timber cutting and grazing and concludes with a proviso that:

> ". . . no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress."

The Secretary contends that this section was intended to apply only to the construction and development of hydroelectric projects and related facilities including power lines. In the context of 16 U.S.C. § 5 and the unlikely intention to require an act of Congress for each electrical line within the park we accept the argument of the Secretary as convincing.

C. *Public Hearings*

Finally, the trial court pointed to the contention of the appellee that no public hearings were ever held with respect to the highway. The existence of any such re-

quirement upon the Secretary of Interior or the Secretary of Agriculture is unclear. It does appear, however, that there was a hearing on this project in 1953. It also appears that there was a public hearing on August 10, 1967. (Record p. 96; 111; 230). The hearing was held by the California Division of Highways which would have been the permittee and was working closely with Agriculture and Interior. It is described in Exhibit F as having been a "well-publicized" public hearing attended by approximately 210 persons including California Assemblymen or their representatives, members of the Boards of Supervisors of Kern County and Tulare County, the Superintendent of Sequoia National Park, the Supervisor of Sequoia National Forest, representatives of fish and game, forest service, Federal Water Pollution Control Administration and civic and public organizations. The Sierra Club was present. It does not appear that the proposed roadway was any clandestine project. As a matter of fact, it does not appear that a permit was issued until more than a year later and then subject to agreement upon design standards. The matter of public hearings cannot be considered a substantial factor in this proceeding.

D. *The National Game Refuge*

A portion of the land within the area under consideration has been designated as a National Game Refuge. It has been suggested that this project would somehow interfere with the refuge and be in excess of authority. The act establishing the refuge declares that:

> "The hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of

> the United States within the limits of said area shall be unlawful."

except under regulations of the Secretary of Agriculture.[17] We find no substance in this argument.

The appellee has not shown with any degree of certainty that it will or can succeed. Neither has it shown that it, or its members or anyone else will suffer irreparable injury. This is not a case "clearly warranting" the grant of a preliminary injunction. *Dymo Industries, Inc. v. Tapeprinter, Inc., supra.* 326 F.2d at 143. The nation's natural resources are not the property of any particular group. One of the basic social ills of today is that we have too many people living too close together. It appears that the friction thus created is becoming increasingly abrasive. The satisfaction of the basic necessities of such a population creates environmental problems which are not within the expertise of this court. We cannot say, however, that the Secretary of Agriculture and the Secretary of the Interior have made an arbitrary and capricious judgment in determining to make available a vast area of incomparable beauty to more people rather than to have it remain inaccessible except to a rugged few.

The Order granting the preliminary injunction is vacated and the cause is remanded for further proceedings in conformity herewith.

HAMLEY, J. (Concurring):

In my view Sierra Club has standing to prosecute this lawsuit. It seems to me that the rationale of recent Su-

[17] 16 U.S.C. § 688.

preme Court pronouncements in this area, if not the precise holdings, call for such a determination. In *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 154 (1970), as the majority itself notes, the Supreme Court made it clear that the element of legal wrong need not be economic in nature, but may be aesthetic, conservational or recreational.

The Sierra Club represents thousands of members who have a deep interest in aesthetic, conservational and recreational values of a kind intended to be safeguarded by the statutes in question, and the regulations and practices thereunder. If these statutes are being disregarded, or the regulations and practices thereunder are invalid, and the result is that the described values are being undermined or disregarded, it seems to me the Sierra Club members may assert that a legal wrong is being inflicted upon them—a wrong which their chosen organization has standing to resist in this lawsuit.

However, for the reasons stated in the last section of the majority opinion, under the heading "The merits," I am convinced that the granting of the preliminary injunction amounted to an abuse of discretion and therefore must be reversed. The trial court acted with painstaking care which is deserving of high commendation, but, in my view, there is an inadequate legal foundation for the order entered.

Appendix B

United States District Court
Northern District of California

No. 51,464

Sierra Club, a non-profit California corporation,
Plaintiff,
vs.
Walter J. Hickel, et al.,
Defendants.

MEMORANDUM OF DECISION

SWEIGERT, J.

The Forest Service, Department of Agriculture intends to issue certain permits to Walt Disney Productions, Inc., a private corporation, for the construction and maintenance of a private hotel-resort, winter-summer complex in the Sequoia National Forest known as Mineral King.

The permits will cover in excess of 1,000 acres of land and, according to plaintiff, will ultimately affect as much as 13,000 acres. It is estimated that the project will involve as high as 35 million dollars of private investment.

Mineral King, since 1926, has been, not only a national forest under the jurisdiction of the Forest Service, Department of Agriculture, but also a national game refuge by special designation of the Congress (26 Stat. Chap. 744).

The permits are to be issued as soon as construction contracts are executed by the State of California for the construction of a substantial segment of a proposed public highway through the adjoining Sequoia National Park which is under the jurisdiction of the National Park Service, Department of the Interior.

The National Park Service intends to issue to the Division of Highways, State of California, a permit for the construction of a new all-weather, high-speed highway, estimated to accommodate 1200 vehicles per hour each way, through the Sequoia National Park as the most economically feasible means of providing motorist highway connection between the California highway system and the proposed Mineral King hotel-resort project which is located, not within the national park, *but* in the adjoining national forest game refuge.

The case is presently before the court on plaintiff's application for a preliminary injunction restraining the defendant federal agencies from issuing the permits in question.

The Forest Service Permits for the Resort-Hotel Project

The permits about to be issued by the Forest Service will, in effect, enable the Developer to construct and maintain a winter-summer, hotel-resort project which, including its "elbow room" for related facilities, will comprise admittedly over 1,000 acres and, as claimed by petitioner, may affect 13,000 acres of forest-game refuge land.

This is to be accomplished by the device of using two kinds of permits: (1) a 30 year-80 acre "term" permit for "most of the major facilities," and (2) a separate

so-called "revocable" permit covering an additional 1,000 acres for "other major facilities, e.g., ski lifts, towers, refuse and sewer disposal, parking areas and roads" for use in conjunction with the resort covered by the 30 year-80 acre term permit.

Title 16 U.S.C. § 497 provides, as far as applicable here, that the Secretary of Agriculture is authorized "to permit the use and occupancy of suitable areas of land within the national forest, *not exceeding 80 acres,* and for periods not exceeding 30 years, for the purpose of constructing or maintaining hotels, resorts or other structures or facilities necessary or desirable for recreation, public convenience and safety." (emphasis added)

The section makes similar provision for industrial and commercial purposes related to or consistent with other national forest uses; also similar provisions for state agency public uses; also similar provision for summer homes and stores, except that in this latter case the acreage limitation is 5 acres.

The legislative history of Section 497, first adopted in 1915, amended in 1948 and broadened to its present form in 1956, indicates quite clearly that, although its purpose has been to grant the Secretary of Agriculture power to issue *term* permits for certain kinds of specified uses, its purpose has been also, and equally important, to restrict term permits for those uses *timewise,* i.e., 30 years for any use, and *areawise* to 5 acres for summer homes and stores, and (since 1956) 80 acres for the uses specified in the kind of usage here involved, i.e., hotels, resorts and other structures or facilities necessary or desirable for recreation, public convenience or safety.

It is also clear from the legislative history that the 80 acre limitation on hotels and resorts was intended to include, not only the resort or hotel, itself, but also any and all structures or facilities related to it, e.g., "elbow room" for ski lifts and other related service facilities. See, *1948 U.S. Code Cong. & Ad. News,* pp. 1337-1338; *1956 U.S. Code Cong. & Ad. News,* pp. 3334-3336.*

It is also clear from the legislative history that in 1948 Congress refused to broaden (except for Alaska), the pre-existing 5 acre limitation for any permit for any purpose and did *not,* in fact, enlarge the acreage provision from 5 to 80 acres with respect to resort-hotel use of forest land in the United States until 1956 upon the representation that the requirements of commerce, industry, recreation and public use of space in the national forests had substantially changed. (See, 1958 U.S. Code Cong. & Ad. News, p. 3336).

It is also clear from the legislative history that in 1956 the Secretary represented to the Congress that his authority to issue "revocable" permits was adequate only "for uses for which long term tenure is unnecessary or *undesirable.*" (U. S. Code Cong. & Ad. News, p. 3636).

The question arises whether this dual permit device is intended to circumvent the clear 80 acre limitation of Section 497 and thereby accomplish what would be in effect a violation of the section.

It will be noted that Section 497, which imposes the 80 acre limitation, does not differentiate between different

*See Defendants' Responding Brief of 7/14/69, attachment No. 1 at p. 3, Letter of 8/5/55, Acting Secretary of Agriculture to Chairman, Senate Committee on Agriculture and Forestry.

kinds of permits. It broadly refers to any "permit" for the specified uses.

So far as so-called "revocable" permits are concerned, Congress has never expressly authorized them. Agriculture claims authorization for them only under its general power to so regulate the forest lands as "to preserve the forests thereon from destruction" (16 U.S.C. § 551) and under an Attorney General's Opinion of 1928. (35 Op. A.G. 485 [11/27/28]).

That opinion, while recognizing an implied power to issue them, narrowly restrict their use to situations in which such a permit is (1) made expressly revocable at will by its terms, and (2) the permitted structures are capable of being removed in case of revocation, and (3) the permitted use will not permanently damage or destroy the land for government use, and (4) the permitted use will be of direct benefit to the United States.

It is questionable whether the so-called "revocable" permits to be used by Agriculture in the present case meet the strict standards prescribed by the Attorney General.

In the first place they are not by their terms expressly made terminable "at will." Clause 15 merely provides that "This permit may be terminated upon breach of any of the conditions herein *or at the discretion* of the Regional Forester or the Chief of the Forest Service." (emphasis added)

Any such revocation is made subject to administrative appeal under Agriculture's own regulations. (36 CFR 211.20-211.119). Also, the Forest Service Manual (FSM

2711.2-5; 10/68), while stating that these permits are "generally for use of short duration," adds that "They will be limited to the time actually needed for exercising the use privileges."

These provisions strongly suggest to the Developer that the so-called "revocable" permit is not really revocable "at will" and that any discretionary revocation thereof must be reasonable in the light of all the circumstances, including the time actually needed for exercising the use privileges covered thereby—use privileges which in the present case are so coupled with the 30 year term permit that the time actually needed for exercising them would obviously be at least 30 years.

Clause 11 provides that "Upon abandonment, termination or revocation or cancellation of this permit the permittee shall remove within a reasonable time all structures and improvements . . . and shall restore the site unless otherwise agreed upon in writing or in this permit. . . ." There is no requirement that the structures shall in fact be capable of such removal or that the use will not be in fact such as to permanently destroy or damage the land for government use.

Further, the uses granted to the Developer by the two purportedly separate permits admittedly relate to a single, unified project and are obviously interlocked and interrelated.

It is inconceivable that Agriculture would, or could under the terms of the "revocable" permit and the circumstances of its issuance, suddenly and "at will" require the Developer to remove ski lifts, towers, refuse and

sewage disposal, parking areas and roads covered by that permit and thus effectively destroy the 35 million dollar investment made by the Developer under his 30 year-80 acre term permit.

The very opinion of the Attorney General relied on by Agriculture warns of just such a possible danger to the public interest in granting revocable permits, saying: "In cases where it appears that the permittee intends to make substantial improvements the removal of which would cause him a great loss in case of revocation of the permit, it is a matter of departmental policy whether a situation should be created by the issue of a permit which may afterwards embarrass the head of the department in the exercise of the powers of revocation."

For the foregoing reasons we conclude that the proposal of Agriculture in the pending case, if carried out, may involve a violation not only of the letter, but also the purpose and intent of Section 497 so far as its 80 acre limitation is concerned.

To hold otherwise would be to assume that the Congress when enacting and amending this acreage limitation, contemplated that it could be circumvented, even nullified, by the device of coupling two different kinds of permits for a single, unified, private hotel-resort development, occupying more than 1,000 acres of a forest game refuge area. If Congress had any such situation in mind, it could have spared itself time and trouble by omitting any area limitation—or by otherwise indicating its intent. Certainly Congress could not have been so naive as to think that "revocable" permits, issued under such circumstances, would *really* be revocable.

National Park Service—Permit for the Highway

Interior proposes to issue to the Division of Highways, State of California, a permit for the construction of a highway *through* the National Park to connect the California Highway system with the Mineral King development, which is located, not within the Park, but outside of it in the national forest game refuge area.

Interior is entrusted with administration of the national park system by such means and measures as conform to the fundamental purpose of said parks, i.e., to conserve the scenery and the natural and historic objects and wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations (16 U.S.C. § 1) and, specifically, as to Sequoia National Park, for the preservation from injury of all timber, mineral deposits, natural curiosities and wonders and their retention in their natural condition. 16 U.S.C. § 43.

There can be no doubt that Interior has the power to construct and improve roads and trails in the national parks (16 U.S.C. § 8) and that, the wide discretion of Interior in that respect should not ordinarily be interfered with.

It appears, however, that in May, 1968, Interior adopted certain Park Road Standards providing that park roads are *not* continuations of state and federal highway network; that they should not be designed to serve as connecting links for routing motorists through the parks to reach ultimate destinations or simply as a connecting device to link points of interest and, further, that a professional ecological determination must precede approval of road construction and design to make sure that

resulting effects on wildlife, drainage, stream flow and climate will be minimal.

Plaintiffs also cite a 1962 House Committee Report of the Congressional Committee of Interior and Insular Affairs (dealing with the Padre Island National Seashore) stating that construction therein of a through highway for general public convenience would give that project a function which does not belong to it and that such a roadway might spoil its very purpose.

In the present case the record shows that the proposed highway, so far as it will cut through Sequoia National Park, is designed and intended, not as an adjunct to the National Park, itself, but as a connecting link to route motorists through the Park to reach an ultimate destination outside the Park—the proposed, private Mineral King resort-hotel complex in the adjoining forest game refuge area.

Thus, the question arises whether the particular highway here in question is fairly within the power of Interior as interpreted by its own standards.

National Park Service—The Transmission Line

It further appears from the record that Interior proposes to permit construction of a 66,000 volt power line across the National Park in order to enable the Developer to obtain necessary electric power for the project.

Title 16 U.S.C. § 45(c), which applies specifically to Sequoia National Park, provides that no permit for transmission lines or for the transmission of power within the Park limits shall be granted or made *without specific authority of Congress.*

Interior contends that this statute was intended to apply only to the construction and development of hydro-electro projects within the Park and does not preclude him from granting rights-of-way across park lands for transmission lines under the general power granted Interior by Title 16 U.S.C. § 5 to grant rights-of-way across public lands of the United States for electrical poles and lines for the transmission of electric power, provided that such right-of-way shall be allowed within or through any national park only upon approval of the chief officer of the department and upon a *finding* that the same is not incompatible with the public interest.

It will be noted, however, that this latter section is a general statute while Section 45(c), deals specifically with Sequoia National Park and, without making any distinction between electric projects within or without the Park, clearly provides that, so far as that Park is concerned, there shall be no permit for any transmission line or for the transmission of power within the Park limits without specific Congressional authority.

Thus, there arises the further question concerning the power of Interior to permit the transmission line—absent specific authority from Congress.

Failure to Hold Public Hearings

Plaintiff contends that no public hearings were ever held by either the Forestry Service with respect to the Mineral King Development or by Interior with respect to the highway or transmission line.

It appears from the record that in March, 1953, Congressman Hagan conducted a hearing at Visalia to determine what could be done to expedite development

of Mineral King. There is, however, no record of any public hearing called or conducted by either the Forestry Service or by Interior.

Whether Forestry Service was required by law to hold such hearings is not clear.

As to Interior, however, plaintiffs contend that it has violated its own rule (34 Fed. Reg. 19 [1/29/69]), calling for both corridor and design public hearings with respect to any major road project that would have a substantial social, economic or environmental effect.

Plaintiff contends that a purported "revocation" of that rule by the new Secretary on April 26, 1969 (34 Fed. Reg. 6985)[1] was ineffective because there was no compliance by the Secretary with the Administrative Procedure Act (5 U.S.C. § 553(b)(c)), providing for publication of general notice of proposed rule making in the Federal Register (553(b)) and opportunity for interested persons to participate in the rule making (553(c)).

"Rule making" is defined by the Administrative Procedure Act (5 U.S.C. § 551(5)) to include, not only the formulation or amendment of rules, but also the "repealing" of rules.

Interior contends that the requirements of 5 U.S.C. § 553(b)(c) are not applicable to rule making on "a matter relating to agency management or personnel or to public property, loans, grants, benefits or contracts" (see, Sec. 553(a)(2)), or to "interpretive rules, general statements of policy or rules of agency organization, procedure or practice." (See, Sec. 553(b)(a)).

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[1]A press release of April 26, 1969 states that the reason for this purported revocation was to provide *even broader public review* and comment—not just on road building, but on all phases of the national park system.

Thus, there is presented the further question whether repeal, without general notice, of the pre-existing rule calling for public hearing concerning major road projects having substantial, social, economic or environmental effects, is a mere rule of procedure, practice or policy and, if not, whether Interior was required by its own rule to conduct public hearings on the highway in question.

Plaintiff's Standing to Sue

Defendants contend that plaintiffs have no standing to sue because they have nothing more than a general interest in common with all citizens and cannot show that any private, substantive legally protected interest of theirs is being directly invaded within the meaning of such cases as *Associated v. Ickes,* 134 F.2d 694 (C.A. 2d 1943); *Anti-Facist v. McGrath,* 341 U.S. 123, 140-41, 151-52 (1951); *Perkins v. Lukins,* 310 U.S. 113, 125 (1940); *Associated v. Camp,* 406 F.2d 837, 838 (8th Cir. 1969).

We are of the opinion, however, that plaintiff, Sierra Club, a non-profit California corporation, organized and existing for the purposes described in its complaint (Par. 3), may be held to be sufficiently aggrieved to have standing as a plaintiff herein. See, *Scenic v. FPC,* 354 F.2d 619 (2d Cir. 1965); *United Church v. FCC,* 359 F.2d 994 (D.C. 1966); *Road League v. Boyd,* 270 F.Supp. 650, 661 (N.Y. 1968); *Powelton v. HUD,* 284 F.Supp. 809, 825-828 (Pa. 1968).

Propriety of Preliminary Injunction

Defendants rest largely on the argument that there is no such urgency as would justify a preliminary injunction at this time.

It appears from the record that the National Park Service permit for construction of the highway by the State of California is ready for issuance at any time and, when issued, will authorize the State of California to proceed at any time thereafter with highway construction.

Affidavits presented on behalf of defendants indicate that the State of California will not actually be in a position to take bids for the highway construction until May 1, 1970 and that actual highway construction can not actually begin until July 1, 1970.

It appears, however, that as soon as Interior grants the highway permit, the State of California, which is not a party to this action and, therefore, not amenable to orders of this court, will be in a position to control the time within which highway construction contracts will be let and thus in effect determine the time when Agriculture must issue its permits to the Developer for construction of the Mineral King project.

In view of the possibility that Interior may issue the highway permit at any time, thereby substantially changing the existing situation and setting events in motion, plaintiff should not be left to "watchful waiting" upon the State of California. We find, therefore, that there is a sufficient showing of imminent and irreparable injury to require pendente lite relief.

Conclusion

It is true that the scope of judicial review over officials to whom Congress has entrusted the control and management of public lands is a particularly narrow one in which

there is, perhaps, less reason for interference with administrative discretion than in any other kind of administrative action. *Ickes v. Underwood,* 141 F.2d 546, 548 (C.A. D.C. 1944).

Nevertheless, we find that plaintiff has raised questions, concerning possible excess of statutory authority, sufficiently substantial and serious to justify a preliminary injunction against both Agriculture and Interior pending trial of these issues on the merits or the further order of this court.

It is beside the point to argue, as do defendants, that a preliminary injunction in this case would interfere with progress by raising doubts about the validity of similar arrangements made with respect to 84 other recreation areas, including 5 in California.

This court is not concerned with the controversy between so-called progressives and so-called conservationists. Our only function is to make sure that administrative action, even when taken in the name of progress, conforms to the letter and intent of the law as laid down by Congress and which only the Congress can change whenever it finds such change to be in the public interest.

Plaintiffs' motion for preliminary injunction is granted.

Dated: July 23rd, 1969.

W. T. Sweigert,
United States District Judge

Filed July 23, 1969,
Clerk, U.S. Dist. Court, San Francisco.

Appendix C

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Article IV, Section 3, Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Administrative Procedure Act (as amended Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 381; 5 U.S.C. §§ 551-706):

5 U.S.C. § 551. Definitions:

For the purpose of this subchapter—

* * *

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

* * *

5 U.S.C. § 553:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

• • •

5 U.S.C. § 702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency

action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 703:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 704:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 705:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it,

pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 U.S.C. § 1:

There is created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge of a director. The Secretary of the Interior shall appoint the director, and there shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. 39 Stat. 535; 48 Stat. 389.

16 U.S.C. §5:

The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a

period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-way herein granted for any one or more of the purposes herein named: *Provided,* That such right-of-way shall be allowed within or through any national park or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all or any part of such right-of-way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

Any citizen, association, or corporation of the United States to whom there has been issued a permit, prior to March 4, 1911, for any of the purposes specified herein under any law existing at that date, may obtain the benefit of this section upon the same terms and conditions as shall be required of citizens, associations, or corporations making application under the provisions of this section subsequent to said date. 36Stat. 1253; 66 Stat. 95.

16 U.S.C. § 8:

The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior. 43 Stat. 90.

16 U.S.C. § 41:

The tract of land in the State of California known and described as township numbered 18 south, of range numbered 30 east, also township 18 south, range 31 east; and sections 31, 32, 33, and 34, township 17 south, range 30 east, all east of Mount Diablo meridian, is reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park, or pleasure ground, for the benefit and enjoyment of the people; and all persons who shall locate or settle upon, or occupy the same or any part thereof except as hereinafter provided [in section 43 of this title], shall be considered trespassers and removed therefrom. 26 Stat. 478.

16 U.S.C. § 45c:

Nothing herein contained [in section 45a or 45b of this title] shall affect any valid existing claim, location, or entry heretofore established [prior to July 3, 1926], under the land laws of the United States, whether for homestead, mineral, right-of-way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land: *Provided,* That under rules and regulations to be prescribed by him the Secretary of the Interior may issue permits to any bona fide claimant, entryman, landowner, or

lessee of land within the boundaries herein established [by sections 45a-45e of this title] to secure timber for use on and for the improvement of his land; and he shall also have authority to issue, under rules and regulations to be prescribed by him, grazing permits and authorize the grazing of livestock on the lands within said park at fees not to exceed those charged by the Forest Service on adjacent areas, so long as such timber cutting and grazing are not detrimental to the primary purpose for which such park is created: *Provided,* That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress. 44 Stat. 820.

16 U.S.C. § 497:

The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; (b) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding five acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining summer homes and stores; (c) to permit the use and occupancy of suitable areas of land within the national forest, not exceeding eighty acres and for periods not exceeding thirty years, for the pur-

pose of constructing or maintaining buildings, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests; (d) to permit any State or political subdivision thereof, or any public or nonprofit agency, to use and occupy suitable areas of land within the national forests not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining any buildings, structures, or facilities necessary or desirable for education or for any public use or in connection with any public activity. The authority provided by this section shall be exercised in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests. 70 Stat. 708.

16 U.S.C. § 551:

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one [provisions of section 471 of this title], and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of sections 473-482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States commissioner specially designated for that purpose by the court by

which he was appointed, in the same manner and subject to the same conditions as provided for in Title 18 United States Code, Section 3401, subsections (b), (c), (d), and (e), as amended. 30 Stat. 35; 76 Stat. 1157; 78 Stat. 745.

16 U.S.C. § 688:

All parts of township 17 south, ranges 31 and 32 east, and township 18 south, range 31 east, Mount Diablo base and meridian, which are north of the hydrographic divide passing through Farewell Gap, and which are not added to and made part of the Sequoia National Park by the provisions of this Act [sections 688-689d of this title], are hereby designated as the Sequoia National Game Refuge, and the hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of the United States within the limits of said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture: *Provided,* That it is the purpose of this section to protect from trespass the public lands of the United States and the game animals which may be thereon, and not to interfere with the operation of the local game laws as affecting private or State lands: *Provided further,* That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established. 62 Stat. 861.

The Secretary of the Interior's Rules for Roadbuilding in National Parks, F.R. Doc. 69-1177; Filed Jan. 28, 1969, read in relevant part as follows:

Office of the Secretary

ROADBUILDING IN NATIONAL PARKS

Adoption of Procedures

The procedures adopted herein are designed to ensure effective public participation in determining the location and design of major road projects in the National Park System administered by the Department of Interior. In addition, they require that full consideration be given to the potential social, economic, and environmental effects of each proposed project.

The following procedures are adopted, effective immediately, and apply to all major road projects in the National Park System administered by the Department of Interior.

(1) Coordination required. When the National Park Service begins considering the development or improvement of a major road it shall solicit the views of those Federal, State, and local agencies that it believes might be interested or affected by the development or improvement. A mailing list will be maintained upon which any such agency may enroll, upon request, to receive notice of projects in any area specified by that agency.

(2) Public hearings required. a. Both a corridor public hearing and a design public hearing will be held, or an opportunity afforded for those hearings, with respect to each major road project that:

(1) Is on a new location; or

(2) Would have a substantial social, economic, or environmental effect.

b. A single combined corridor and design public hearing will be held, or the opportunity for such a hearing afforded, on all other projects before a location is approved, except as provided in subparagraph 2.c below.

c. Hearings are not held on a project that is solely for such improvement as resurfacing, widening existings lanes, adding auxiliary lanes, replacing existing grade separation structures, and installing traffic control devices or similar improvements, if the project would not have a substantial social, economic, or environmental effect.

d. An opportunity for another public hearing will be afforded in any case where proposed locations or designs are so changed from those presented, in the notices specified below or at a public hearing, as to have a substantially different social, economic, or environmental effect.

* * *

(7) Definitions. a. A "corridor public hearing" is a public hearing that:

(1) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the need for and the general location of, a major road; and

(2) Provides a public forum that affords a full opportunity for presenting views on each of the proposed alternative locations, and the social, economic, and environmental effects of those alternate locations.

b. A "design public hearing" is a public hearing that:

(1) Is held after the major road location has been approved, but before design approval;

(2) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the specific location and major design features of a major road; and

(3) Provides a public forum that affords a full opportunity for presenting views on alternative de-

sign features, including the social, economic, environmental, and other effects of alternate designs.

c. "Social, economic, and environmental effects" means the direct and indirect benefits or losses such as:

(1) Public health, safety and welfare.

(2) Conservation, including erosion, sedimentation, wildlife and general ecology of the area.

(3) Use of recreational areas and parks.

(4) Natural and historic landmarks.

(5) Aesthetics.

(6) Noise, and air and water polution.

(7) Fire protection.

(8) Fast, safe, and efficient transportation.

(9) Engineering, right-of-way, and construction costs of the project and related facilities.

(10) Maintenance and operating costs of the project and related facilities.

(11) Operation and use of existing road facilities and other transportation facilities during construction and after completion.

d. "Major roads" means the main entrance roads and arteries of the park circulation system.

This list of effects is not meant to be exclusive, nor does it mean that each effect considered will be given equal weight in making a determination upon a particular major road location or design.

Issued in Washington, D.C., on January 18, 1960.

STEWART L. UDALL,
Secretary of Interior

NOV 23 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~939~~ 70-34

SIERRA CLUB, *Petitioner,*

v.

WALTER J. HICKEL, et al., *Respondents.*

BRIEF FOR THE ENVIRONMENTAL DEFENSE FUND AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE ENVIRONMENTAL DEFENSE FUND

The Environmental Defense Fund (EDF) is a non-profit public-benefit corporation organized under the laws of the State of New York and composed of scientists, educators, lawyers, and other citizens dedicated to the protection of our environment and the wise use of the nation's natural resources. Among its objectives are "to effect a joining of the best scientific findings with the most appropriate social action discovered by the social sciences and legal theory in order [to] * * * best promote a quality environment" [By-laws, Art. 1:2(d)]. EDF's "social action" includes education,

research, and when necessary "to prevent * * * environmental degradation" legal action which is designed in part "to provide scientists fair and impartial forums in which their scientific findings may be presented objectively to their fellow citizens" [*id.*, Art. 1:2(f)].

In accordance with its objectives, EDF through its Scientific and Legal Advisory Committees evaluates and defines environmental issues, collects research data relating to those issues, and determines whether litigation is the appropriate course to follow. Its national membership and professional resources thus enable EDF to focus public attention upon environmental incursions that would otherwise go unrecognized. Its prosecution of many major environmental lawsuits[1] has established it as one of the nation's most effective and responsible litigants in this important field.

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[1] See, *e.g.*, *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (DDT pesticides); *Environmental Defense Fund, Inc. v. United States Dept. of Health, Educ. & Welfare*, 428 F.2d 1083 (D.C. Cir. 1970) (DDT tolerance levels); *Environmental Defense Fund, Inc. v. Hoerner Waldorf Corp.*, D. Mont., No. 1694 (order filed Aug. 27, 1970) (paper mill discharges); *Environmental Defense Fund, Inc. v. Resor*, D.D.C., Civil No. 2394-70 (order filed Aug. 14, 1970) (nerve gas); *Environmental Defense Fund, Inc. v. Hardin*, D.D.C., Civil No. 2319-70 (complaint filed Aug. 5, 1970) (Mirex); *Environmental Defense Fund, Inc. v. United States Army Corps of Engineers*, D.D.C., Civil No. 1722-70 (complaint filed June 2, 1970) (Olin DDT water contamination); *Environmental Defense Fund, Inc. v. United States Army Corps of Engineers*, D.D.C., Civil No. 2655-69 (complaint filed Sept. 15, 1969) (cross-Florida barge canal); *Environmental Defense Fund, Inc. v. Montrose Chem. Corp.*, C.D. Cal., Civil No. 70-2389-ALS (complaint filed October 22, 1970) (DDT discharge in coastal waters); *Wildnerness Society, Inc. v. Hickel*, D.D.C., Civil No. 928-70 (complaint filed April 23, 1970) (trans-Alaska pipeline); *In re: Environmental Defense Fund, Inc.*, F.A.A., No. 1035-7 (petition filed Aug. 25, 1970) (SST).

EDF accordingly has a vital interest in seeking review of the lower court's decision, which if left undisturbed would authorize the unlawful degradation of public lands in Sequoia National Forest and Sequoia National Park and would foreclose to EDF litigation in the courts of the Ninth Circuit. Petitioner and respondents have consented to the filing of this brief.[2]

STATEMENT OF THE CASE

The Sierra Club, a non-profit California corporation, brought this action to enjoin the issuance of federal permits for the development of a large private resort in the Sequoia National Game Refuge area of Sequoia National Forest and the construction of an access road through the Sequoia National Park. In its motion for preliminary injunction the Sierra Club asserted that the threatened action would permanently destroy natural values of public lands and would irreparably harm the public interest in conserving those values; it alleged that the Secretary of the Interior would exceed his authority by authorizing the construction of the new highway and the installation of a private transmission line across the Park, and that the Secretary of Agriculture would exceed his authority by granting the developer a revocable permit covering some 13,000 acres of National Forest land in addition to a term permit covering 80 acres.

The District Court granted the preliminary injunction. On appeal the Ninth Circuit vacated the injunction, holding (1) that the Sierra Club lacked standing and (2) that the Sierra Club had shown neither a "reasonable certainty" that it would prevail nor irreparable injury. Judge Hamley, concurring in the result, would have held that the Sierra Club had standing.

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[2]The written contents have been filed with the Clerk.

REASONS FOR GRANTING THE WRIT

The decision below raises issues of great importance. In this brief we show that the lower court's holding with respect to standing is in direct conflict with recent decisions of the Second Circuit and the District of Columbia Circuit, and that if left undisturbed it would insulate from judicial review many important administrative determinations affecting the nation's public lands and natural resources. We do not here take up the "merits" except to adopt the views expressed by the Petitioner.[3]

A. The Decision Below Conflicts with Decisions of Other Circuits

The Ninth Circuit's decision as to standing squarely conflicts with holdings of the Second Circuit and of the District of Columbia Circuit. The conflict concerns the application of this Court's decisions in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970) and *Barlow v. Collins*, 397 U.S. 159 (1970) to a national environmental organization suing to vindicate the interests of the general public in conserving natural resources.

1. Under *Data Processing and Barlow*, the threshold test for standing to sue in federal courts—and the only test to which the court below addressed itself in holding that the Sierra Club had no standing—is whether the plaintiff has

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[3]We strongly urge that the merits deserve review by this Court. We recognize, of course, that if the Court determined not to review the merits it could still decide the issue of standing, since a reversal on that ground would enable Petitioner to assert its prayer for permanent injunctive relief. See *Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472, 475-76 (9th Cir. 1969). This course would, however, open the way to commencement of work on the project and would leave the Sierra Club with serious practical obstacles to obtaining meaningful relief. Thus, our silence on the merits is not to be construed as an invitation to limit the grant of certiorari. Indeed, we anticipate that if the petition is granted we will file a brief covering all the issues to which the writ is directed.

"the personal stake and interest that impart the concrete adverseness required by Article III" [*Barlow*, 397 U.S. at 164.] In practical terms, this means the plaintiff must allege that "the challenged action has caused him injury in fact" [*Data Processing*, 397 U.S. at 152.] While the Court was clear that the interest sought to be protected by the plaintiff "may reflect 'aesthetic, conservational, and recreational' as well as economic values" [*id.* at 154], the plaintiffs in *Data Processing* and *Barlow* were able to allege direct economic harm; the Court therefore had no occasion to consider what allegations would be required to sustain the standing of an organization that suffered no special harm to itself but that sued to protect the public interest [see 397 U.S. at 172 n. 5 (opinion of Mr. Justice Brennan)].[4]

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[4]The remaining two tests under *Data Processing* and *Barlow* are "whether the interest sought to be protected * * * is arguably within the zone of interests to be protected or regulated by the statute * * * in question" [*Data Processing*, 397 U.S. at 153] and "whether judicial review * * * has been precluded" [*id.* at 156]. The Court below did not reach these questions except to suggest with respect to the "zone of interests" inquiry that "the significance of the language is not clear" and that "it does not establish a test separate and apart from or in addition to" the injury in fact test [Appendix to Petition ("App."), p. 13].

Resolution of the threshold test favorably to the Petitioner here will mean that it has standing, for the remaining questions can reasonably be answered only in the Sierra Club's favor. Thus, there can be no serious doubt that the interest asserted by the Sierra Club—*ie.*, the interest in protecting Sequoia National Forest and Sequoia National Park—is within the zone of interests protected by the relevant statutes. See 16 U.S.C. § § 43, 45b, 551 (1964). Nor can there be any serious assertion that Congress has expressly or impliedly precluded judicial review of unauthorized agency action with respect to public lands in general or the lands here in issue. Cf. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

The issue thus left open by this Court was presented almost simultaneously to the Second Circuit, the District of Columbia Circuit, and the Ninth Circuit. The results were wholly at odds.

2. In *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970), *petitions for cert. filed*, Nos. 614, 615, the U.S. Army Corps of Engineers had issued a permit authorizing New York State's Department of Transportation to effect the dredging and filling of a portion of the Hudson River necessary for the construction of a six-lane highway. Suit was brought by the Sierra Club, the Citizens Committee for the Hudson Valley (an unincorporated association of citizens who resided near the proposed highway), and the Village of Tarrytown (through which the highway would pass) to enjoin the issuance of any permits or the commencement of any construction in the absence of Congressional consent and approval of the Secretary of Transportation as required by the Rivers and Harbors Act and the Department of Transportation Act. The District Court granted the relief sought, and the defendants on appeal raised the issue of standing.

Dealing first with the Sierra Club and the Citizens Committee, the Court of Appeals noted that they

> "made no claim that the proposed Expressway or the issuance of the dredge and fill permit threatened any direct personal or economic harm to them. Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area immediately threatened with drastic alteration, claiming that they were 'aggrieved' when the Corps acted adversely to the public interest. They are, as the federal defendants observe, serving as 'private Attorney Generals' to protect the public interest." [425 F.2d at 102.]

The court was thus faced with the "personal stake or interest" question left unanswered by this Court. Its solution was to require that an organization asserting the public interest demonstrate, by reference to its established purposes

and record of activities, a serious and responsible concern about the particular issue involved.

> "All plaintiffs made a vigorous effort to present their views to the New York Department of Transportation and to the federal officials responsible for granting the disputed permit. They have evidenced the seriousness of their concern with local natural resources by organizing for the purpose of cogently expressing it, and the intensity of their concern is apparent from the considerable expense and effort they have undertaken in order to protect the public interest which they believe is threatened by official action of the federal and state governments. In short, they have proved the genuineness of their concern by demonstrating that they are 'willing to shoulder the burdensome and costly processes of intervention' in an administrative proceeding. * * * They have 'by their activities and conduct * * * exhibited a special interest in' the preservation of the natural resources of the Hudson Valley." [425 F.2d at 103.]

The court was therefore led to conclude that each of the plaintiffs had standing, "as responsible representatives of the public, * * * to obtain judicial review of agency action alleged to be in contravention of [the] * * * public interest" [425 F.2d at 105].

3. The District of Columbia Circuit reached the identical result in *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970). In *Hardin*, five organizations engaged in activites relating to the environment" [428 F.2d at 1095], including EDF and the Sierra Club, sought to compel the Secretary of Agriculture to issue notices of cancellation for all economic poison containing DDT and to suspend registration for such products pending cancellation proceedings. On the Secretary's motion to dismiss, the Court of Appeals held that the petitioners had standing, that the Secretary's refusal to act was a final order, and that the order was reviewable.

With respect to standing the court noted that the injury complained of was of universal nature.

> "The injury alleged by petitioners is the biological harm to man and to other living things resulting from the Secretary's failure to take action which would restrict the use of DDT in the environment." [428 F.2d at 1096.]

Therefore, since the petitioners asserted no special harm to themselves or their members, the question was whether an organization such as EDF or the Sierra Club could have standing as a representative of the public's interest in preventing environmental degradation, and if so whether these particular organizations had a sufficient stake in the outcome for purposes of Article III. As to both questions the court agreed with the Second Circuit.

> "[T]he consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem.
>
> "On the basis of petitioners' uncontroverted allegations, it appears that they are organizations with a demonstrated interest in protecting the environment from pesticide pollution. Therefore they have the necessary stake in the outcome of a challenge to the Secretary's inaction to contest the issues with the adverseness required by Article III of the Constitution." [428 F.2d at 1097; footnote omitted.]

4. By contrast, the Ninth Circuit on almost identical allegations could find no personal stake or interest in the Sierra Club and expressly rejected the notion that an organization asserting the public interest could, without some allegation of direct injury to itself, have standing to sue in the federal courts. The Sierra Club had alleged that it is a nonprofit California corporation with a national membership of 78,000. It asserted that "it has for many years taken a special interest in the conservation and sound maintenance of the national parks and forests and particularly lands on the slopes of the Sierra Nevada Mountains" [App.

9]. The Club alleged that its interests would be vitally affected by the action sought to be enjoined. This was not enough.

> "The complainant does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened. Certainly it has an 'interest' in the sense that the proposed course of action indicated by the Secretaries does not please its officials and board of directors and through them all or a substantial number of its members. It would prefer some other type of action or none at all. * * *
>
> "We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all of the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority." [App. 10.]
>
> "We do not believe that the Sierra Club's complaint alleges that it or its members possess a sufficient interest for standing to be conferred. There is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them." [App. 16.]

The court below evidently was unaware of the District of Columbia Circuit's decision in *Hardin*, but it did recognize that the Second Circuit had found standing in the Sierra Club as a representative of the public interest. The court observed in this connection that the Club had there been "joined by local conservationist organizations made up of local residents and users of the area" [App. 17].[5] It

[5] In fact, while the Citizens Committee consisted of local residents, there is nothing in the Second Circuit opinion nor in the opinion of the District Court (302 F.Supp. 1083) to suggest that plaintiffs were "users" of the area. We assume the court below had reference to a District Court opinion also cited in this connection, *Parker v. United States*, 307 F.Supp. 685 (D. Colo. 1969).

did not, however, suggest that this was important to the decision there, for the Second Circuit was quite clear both that the Sierra Club had independent standing and that the "local conservationist organization," like the Sierra Club, made no claim of economic or other direct harm but asserted instead the public interest in conserving natural resources [425 F.2d at 102].[6] The Ninth Circuit accordingly acknowledged that it flatly disagreed with the Second Circuit's holding with respect to the Sierra Club's standing to assert the public interest.

> "To the extent to which *Citizens Committee for Hudson Valley v. Volpe, supra,* indicates that the Sierra Club has standing within the 'private Attorney Generals' rule, we respectfully disagree. We believe that rule is limited as it states to cases where Congress has enacted a statute 'conferring on any non-official person, or on a group of non-official persons, authority to bring a suit' to prevent unauthorized official action. See, *Scanwell Laboratories, Inc. v. Shaffer, supra,* 424 F.2d at 864. We find no indication in any federal statute that Congress has 'conferred' on the Sierra Club or any group like it, authority to bring suits to challenge official action." [App. 17, n. 9.]

5. The requirements for standing are thus quite different in the three circuits. In the Second Circuit and District of Columbia Circuit, an organization may litigate an environmental issue if it alleges that by its activities and conduct it has demonstrated a special interest in the preservation of natural resources in general and that issue in particular. In the Ninth Circuit, the same organization making the same allegations would be barred, for one must allege some "direct and obvious interest" [App. 17], such as property dam-

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[6] It may be worth noting here that a "resident or user" rule, unless read very broadly, would in effect arbitrarily immunize from judicial scrutiny *any* administrative determination affecting (1) remote and inaccessible public lands or water, as in Alaska, and (2) natural resources that are not usable in any normal sense, such as protected game.

age or other economic injury, threat to the organization's status, or danger to its members. Uniform application of federal constitutional law requires that this Court review the Ninth Circuit's decision and resolve the important issue of standing.

B. The Decision Below Would Foreclose Judicial Review of Important Agency Determinations

We believe the conflict in the Circuits should be resolved by this Court and resolved favorably to the Petitioner, for the alternative is effectively to insulate from judicial review even the most blatantly lawless administrative determinations affecting the nation's public lands and natural resources. We do not consider it necessary or appropriate to dwell upon the obvious importance of sound management and wise use of this nation's precious resources. We accordingly discuss here only the crucial role of the courts in environmental protection and the impact of the decision below upon that role.

1. It is the policy of the United States that the nation's public lands shall be managed "to provide the maximum benefit for the general public." Act of Sept. 19, 1964, § 1, 78 Stat. 982, 43 U.S.C. § 1391 (1964). In practice, however, there is little assurance that this policy is effectuated. First, our public land laws are, as the Congress has recognized, "inadequate to meet the current and future needs of the American people" and in any event "are not fully correlated with each other." *Id.*, § 2, 43 U.S.C. § 1392 (1964). The Public Land Law Review Commission, established by the Congress in 1964 to conduct a comprehensive review of these laws and their administration, found after five years of study that the Congress has "largely delegated to the executive branch" its authority over public lands, and that these "delegations have often been lacking in standards or meaningful policy determinations." Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and the Congress*, p. 2 (June 1970).

The administration of these inadequate laws has in turn been inadequate. Thus, the Commission found "serious procedural problems" in the implementation of Congressional policy by the federal land management agencies [*id.* at 251], including exclusion of the public from participation in land use planning activities [*id.* at 57, 251]. Rules and regulations governing the use of federal lands, "to the extent they exist, have not been adequate to fulfill the purpose," have been promulgated without consulting those affected or the general public, establish cumbersome and expensive procedures, and give "no assurance of objective, impartial consideration" [*id.* at 2]. The Commission accordingly recommended an overhaul of agency procedures to "embody proper regard for traditional due process concepts of fairness and equity" [*id.* at 251]. It also recognized, however, the overriding need for judicial review of land determinations, declaring that it was "convinced that without the availability of some kind of court review, any legislative or administrative improvements * * * would be largely only advisory" [*id.* at 256].[7]

It requires no extensive discussion to show that the national environmental organizations such as EDF and the Sierra Club are the most effective litigators in this crucial area. Without their professional resources many critical environmental problems would never be recognized or, if recognized, never result in legal action. This was the thrust of a recent letter from the Chairman of the President's Council on Environmental Quality to the Commissioner of Internal Revenue, in which he recommended continuation of tax exempt status to organizations that litigate to

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[7]The Commission recommended as a means of minimizing "the dilatory effects of court involvement * * * that in general the availability of judicial review be limited to those parties who participated in the administrative proceeding for which review is sought" [Report, p. 257]. In this connection we note that the Sierra Club requested a hearing before the Forest Service and the Secretaries of Agriculture and Interior but to no avail [R. 66-67].

protect the environment because "private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique" [*BNA Environment Rep.*, Current Dev., p. 26:629 (Oct. 16, 1970)]. The letter explained that litigating groups have strengthened anti-pollution enforcement, have encouraged elimination of regulatory gaps, and have represented the public's interest in enforcement of new governmental procedures [*id.*, p. 28:701 (Nov. 6, 1970)]. Numerous congressmen have endorsed these views [*id.*, p. 26:652 (Oct. 23, 1970]. The Ninth Circuit's decision, by barring to these organizations access to the courts in that jurisdiction, will thus effectively shield from public scrutiny, and from the public consciousness as well, many administrative decisions bearing importantly on the environment. The nation cannot, we submit, tolerate so retrogressive a step.

2. The decision's primary impact will, of course, be upon the public lands located in the Ninth Circuit. This is but little comfort. One-third of the nation's land—755 million acres—is federally owned, and 78% of the public lands are in the states of the Ninth Circuit [Public Land Law Review Commission Report, *supra*, at 327]. Indeed, nearly half of all federal land is in the state of Alaska [*id.*], much of it remote and inaccessible. By the Ninth Circuit's decision these lands are abandoned to administrative caprice, for none can allege that an unlawful determination respecting remote public lands damages its property or threatens its status or endangers its members. Since only the "public" suffers the injury in fact, and since the Ninth Circuit excludes representatives of the public, there can as a practical matter be no effective remedy for unlawful agency action.[8]

[8] Although by careful forum-shopping groups like EDF and the Sierra Club could sue federal officials in the District of Columbia where standing would present only minimal difficulties, the witnesses, the land, and the most intimately concerned public would all be on the West Coast. This would surely handicap any effort to conduct effective litigation.

Such a sacrifice of our precious public lands should not, we submit, be made without this Court's review.

CONCLUSION

The decision of the court below conflicts with recent decisions in two other circuits. It is essential that the conflict be resolved promptly lest by unlawful agency action the nation's natural resources be mismanaged and despoiled. The issue is one of great legal and practical importance and should be decided by this Court.

Respectfully submitted,

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November 23, 1970

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DEC 8 1970

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 939

SIERRA CLUB,

Petitioner,

v.

WALTER J. HICKEL, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE WILDERNESS SOCIETY, IZAAC WALTON LEAGUE OF AMERICA AND FRIENDS OF THE EARTH, AS AMICI CURIAE

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OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit (Pet. App. A, pp. 1-28) and the United States District Court for the Northern District of California (Pet. App. B, pp. 29-42) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1970, and the petition for a writ of certiorari was filed on November 5, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a national conservation organization has standing to sue to prevent permanent damage to Sequoia National Game Refuge, Sequoia National Forest and Sequoia National Park under statutes intended to protect these areas.

2. Whether defendants may allow the construction of a large resort and a connecting highway and electric transmission line in Sequoia National Game Refuge, Sequoia National Forest and Sequoia National Park even though such uses are inconsistent with the purposes for which Congress reserved these federal lands. More specifically, whether defendants may:

Circumvent the 80-acre limitation on long-term permits for national forests (16 U.S.C. 497) by issuing supplemental permits for 13,000 acres which are not revokable either in fact or law;

Ignore a stature (16 U.S.C. 688) requiring that all use of Sequoia National Game Refuge be consistent with the purposes for which the refuge was established;

Authorize a major highway across Sequoia National Park for a non-park purpose despite requirements that the Park be conserved (16 U.S.C. 1, 43); and

Ignore a statute (16 U.S.C. 45(c)) requiring Congressional approval of any transmission line in Sequoia National Park.

INTEREST OF AMICI CURIAE

All three amici curiae are major, national conservation organizations with deep and well-established interests in protecting America's great scenic resources. They are

increasingly relying upon litigation as a principal means for carrying out their purposes.

The Wilderness Society is a nonprofit citizens' organization with approximately 80,000 members. It was organized in 1935 to obtain protection for the Nation's remaining wild lands, to carry on education programs concerning the wilderness, and to conserve our natural resources.

Friends of the Earth is a nonprofit organization with 8000 members and is dedicated to the preservation, restoration and rational use of the environment in the United States and throughout the world. It is particularly interested in preserving the world's natural ecosystems and remaining wild places.

The Isaac Walton League of America is a nonprofit organization with approximately 50,000 members. Its primary goal is restoring and maintaining the quality of the environment through the protection and wise use of our natural resources.

Both the petitioner and respondents have consented to the filing of this brief.

STATEMENT

The amici curiae adopt as their statement of the case the statement contained in the petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Direct Conflict With Two Court of Appeals' Decisions on an Important Issue of Standing

The Court of Appeals held that the plaintiff, the Sierra Club, did not have standing to sue pursuant to various federal statutes which restrict the authority of the Secretaries of Interior and Agriculture to permit use of national park, refuge, and forest land. The court recognized the standing of "local conservationist organizations made up of local

residents and users of the area affected by the administrative action" (Pet. App. 17). The court distinguished the Sierra Club on the ground that "there is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them" (Pet. App. 16).

The holding of the Court of Appeals for the Ninth Circuit is in square conflict with decisions of two other circuits and several district courts. The court below specifically rejected (Pet. App. 17, note 9) the holding in *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97 (C.A. 2, 1970), that the national conservation organizations, and specifically the Sierra Club, have standing.[1] In contrast to the Ninth Circuit's holding, the Second Circuit explicitly upheld the Sierra Club's standing on the ground that the Club (425 F.2d at 102):

> made no claim that the proposed Expressway or the issuance of the dredge and fill permit threatened any direct personal or economic harm to them.

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[1] In its petition in this case the Sierra Club noted (p. 10) correctly the conflict between the decision of the court below and that of the Second Circuit in *Citizens Committee v. Volpe*. However, in its Brief in Opposition to Petitions for a Writ of Certiorari in *Citizens Committee v. Volpe*, Nos. 614 and 615, this Term, the Sierra Club said (p. 25) that the disagreement between circuits "is not material . . . to the Ninth Circuit's principal holding and constitutes no reason for review by this Court." In fact, the Ninth Circuit's decision is in direct conflict with one of the holdings by the Second Circuit—i.e., that national conservation organizations have standing to protect the environment—and therefore fully justifies review by this Court of the Ninth Circuit case. But since both the Second and Ninth Circuits agree that some of the plaintiffs in the Second Circuit case, the local conservation organizations, have standing, there is no basis for this Court to review the Second Circuit case on the issue of standing. For even if the Ninth Circuit is correct and national conservation organizations do not have standing, this will affect only one holding, not the decision, of the Second Circuit.

> Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area immediately threatened with drastic action, claiming that they were "aggrieved" when the Corps acted adversely to the public interest. They are . . . serving as "private Attorney Generals" to protect the public interest.

Similarly, the decision below is in conflict with *Environmental Defense Fund, Inc. v. Hardin,* 428 F.2d 1093, 1097 (C.A. D.C., 1970), where the Court held that national conservation organizations had standing to attack the continued marketing of DDT:

> [T]he consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem.
>
> On the basis of petitioners' uncontroverted allegations, it appears that they are organizations with a demonstrated interest in protecting the environment from pesticide pollution. Therefore they have the necessary stake in the outcome of a challenge to the Secretary's inaction to contest the adverseness required by Article III of the Constitution.

The national organizations whose standing was upheld included the Environmental Defense Fund, the Isaac Walton League, the National Audubon Society and the Sierra Club, the plaintiff in this case. Accord, *Environmental Defense Fund, Inc. v. HEW,* 428 F.2d 1083, 1085, note 2 (C.A. D.C., 1970). And several district courts have also upheld the standing of national conservation organizations. *Isaac Walton League v. St. Clair,* D. Minn., Civ. No. 5-69, decided June 1, 1970 (standing upheld because "the League has a long history of activity in conservation matters and natural resource preservation"); *Parker v. United States,* D. Colo., Civ. No. C-1368, decided December 24, 1969 (upholding, *inter alia,* the standing of the Sierra Club); *Wilderness Society v. Hickel,* D. D.C., Civ. No. 928-70, decided April 23, 1970.

It is possible that the issue of standing in this case could be overcome if this Court remanded the case to the district court to allow plaintiff the opportunity to amend its complaint. The Sierra Club has a national membership of 78,000 of whom 27,000 reside in the San Francisco area. Some of its members probably use the Mineral King Valley and the portion of Sequoia National Park affected by the proposed development.

However, the holding of the court below is of fundamental importance for the protection of the environment —possibly for this case but certainly in other cases. Environment cases increasingly raise issues which do not involve, or only incidentally involve, direct users: The protection of wilderness areas, the preservation of wildlife refuges, the survival of rare and endangered species, the integrity of natural rivers, and the natural or scenic aspect of landscape. Those who bring the suits may incidentally be users in that they or their members have walked, watched and beheld the subject of the litigation. However, such use is often incidental to the larger purpose to protect the integrity of the environment.[2] And if the only persons with standing are users no one will have standing where there is no present use (such as a suit to preserve the wilderness) or no use is possible (such as a suit to prevent the chemical poisoning of eagles).

Even where there are users, they will frequently be unwilling to sue. Nearby resident-users of a wilderness area may desire development because of the economic benefits which will result. National conservation organizations may be the only parties who will represent the national, as opposed to local, interest by opposing development. This conflict between local and national interests is particularly obvious

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[2]Two important examples other than the instant case are *Wilderness Society v. Hickel, supra* (the Alaska Pipeline case) and *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, D.W. Va., Civ. No. 70-82-E (involving use of a possible wilderness area).

and significant with regard to national parks, refuges, and forests which must be preserved even if local residents desire to develop them.

Furthermore, as the statute creating the National Park Service makes clear, one of the purposes for which these lands are reserved is "to conserve the scenery and the national and historic objects and the wild life therein . . . ." 16 U.S.C. 1. It follows that conservationists, as well as users, must have standing to protect the national interest in preserving the national parks. Analogous reasoning applies to national refuges and forests. See 16 U.S.C. 476, 694.

The plaintiff—the Sierra Club—and the four amici curiae—the Wilderness Society, Friends of the Earth, the Isaac Walton League, and the Environmental Defense Fund[3]—all have as their principal interest the protection and conservation of the environment. While the Sierra Club, Wilderness Society and the Isaac Walton League are also interested in appropriate uses of natural areas consistent with conservation of the environment, this is not their principal interest. They should not be required to assert this subsidiary interest in order to obtain standing to prevent despoilment of the environment. The other two organizations do not represent users at all and cannot assert standing on that basis.

Finally, Congress, in enacting the National Environment Policy Act, has recognized the standing of national conservation organizations to protect the environment. That Act declares that it is federal policy to use "all practical means and measures" to protect the environment in cooperation with "concerned . . . private organizations." 42 U.S.C. 4331 (a). Russell E. Train, the Chairman of the President's Council on Environmental Quality, which was created by the Act, has stated that (BNA Environment Reporter, 1970, p. 745):

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[3]The Environmental Defense Fund has filed a separate brief supporting the petition for a writ of certiorari.

> Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reenforcing government environmental protection programs.

The Council has itself specifically noted with approval the decisions in *Wilderness Society v. Hickel, supra,* and *Citizens Committee for the Hudson Valley v. Volpe, supra,* upholding the standing of national conservation organizations. BNA Environment Reporter, 1970, p. 746.

2. The Decision of the Court Below Allowing Use of Federal Parks, Forests and Refuge Lands for Uses Inconsistent with the Purposes for Which Congress Reserved Them Raises Issues of Major National Importance

The issues raised by this case on the merits involve actions by the Secretaries of Interior and Agriculture in permitting use of Sequoia National Refuge, Forest, and Park inconsistent with their purposes as specified by Congress.

Congress has provided that the Department of Interior shall regulate national parks to conform to the fundamental purpose . . . which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1. Congress has provided specifically with respect to Sequoia National Park that the Secretary of the Interior has the duty to establish regulations "for the preservation from injury of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition." 16 U.S.C. 43. Sequoia National Game Refuge was established "to protect from trespass the public lands of the United States and the game animals which may be thereon" and permitted the Secretary of Agriculture only to allow uses within the Game Refuge

which "may be consistent with the purpose for which said game refuge is established." 16 U.S.C. 688.

The court below has in effect ignored the well established rule that Congress has plenary power under the Constitution concerning federal lands (Article IV, § 3, cl. 2) and that defendants have only the powers given them by Congress. *United States v. California,* 332 U.S. 19, 27; *Udall v. Shale Oil Corp.*, 406 F.2d 759, 764 (C.A. 10, 1969). The defendants have allowed major, permanent uses—a large resort, highway, and electric transmission line—to be built in a national park, refuge, and forest in conflict with both the purposes for which they have been reserved by Congress and specific statutory limitations.

a. First, Congress has authorized the Secretary of Agriculture to grant permits for constructing hotel or resorts in national forests only for 80 acres and for 30 years. 16 U.S.C. 497. Nevertheless, the Secretary has given a permit for 13,000 acres for the construction of ski lifts, sewage treatment facilities and parking structures as part of the development of a large resort. The court of appeals justifies this permit on the ground that the Secretary has traditionally exercised the broad power to issue revocable permits.

It is clear, however, that the admitted power of the executive to issue revocable permits cannot be allowed to circumvent Congressional limitations on the use of land in federal forests. The Secretary of Agriculture cannot be permitted to issue what are in fact long-term permits for extensive acreage in the guise that they are revocable. If the Secretary is allowed to issue such permits, the 80-acre limitation imposed by Congress will become virtually meaningless.

The revocable permit involved here is not truly revocable.[4] The ski lifts, sewage treatment plants, and parking facilities

[4] An opinion of the Attorney General in 1962 recognizes the difference between revocable and term permits by stating that a revocable permit is valid only if (1) the permit is expressly revocable at will; (2) the permitted structures are capable of being removed in case

cannot be removed and the use of bulldozers to create ski slopes will permanently damage the area. Plainly the permit is not revocable before the termination of the 30-year-permit since the developer is making a 35 million dollar investment contingent on the use of 13,000 not 80 acres.[5]

b. Congress has provided that the Secretary of Agriculture has authority to permit other uses of lands in the Sequoia National Game Refuge only "so far as they may be consistent with the purposes for which said game refuge is established." 16 U.S.C. 688. The refuge was established is protect scenically outstanding public lands and game animals and their habitat. *Ibid.* Personnel of the California Fish and Game Commission stated "that in an extensive development such as the Disney proposal, considerable wildlife habitat would be lost and wildlife would suffer" (R. 119). And the Secretary of Agriculture has neither made a finding nor could he make a finding that a large ski resort was compatible with the purpose of the refuge.

c. Defendants propose to allow the State of California to build a modern highway through Sequoia National Park purely to give access to the resort in Mineral King. This is a new modern highway which will have a different alignment than the present inadequate mountain road and will cause

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of revocation; (3) the permitted use will not permanently damage or destroy the land; and (4) the permitted use will be of direct benefit to the United States. 35 Op. Atty. Gen. 485. Similarly, Attorney General Stone concluded that a revocable patent license is only valid if "the occupancy is subject in theory and in fact to immediate termination at any time at the will of the Government." 34 Op. Atty. Gen. 320, 328.

[5]The Court below implicitly admitted both that the permit is not truly terminable "at will" and that the improvements cannot be removed by holding that a revocable permit can be issued regardless (Pet. App. 21).

extensive damage to the scenery and ecology of the park, including the Giant Sequoias, the great trees for which the park is named.

The Secretary of Interior has no authority to use land in a national park for a non-park purpose—to build a road to give access to a private resort outside the park. Such use is inconsistent with the responsibilities placed on the Secretary by Congress, both as to national parks generally and Sequoia in particular, to allow uses which preserve the scenery, the trees, the wildlife and the natural wonders.

d. Congress has provided that no permit for "transmission lines" will be issued in Sequoia National Park. 16 U. S.C. 45c. Without explanation, the court below held that this section was intended to apply only to hydroelectric projects and related facilities (Pet. App. 25). This decision is directly inconsistent with the plain words of the statute.

Two of these issues, those relating to revocable permits in national forests and the construction of highway across national parks for non-park purposes, are of major importance in their own right since they apply to national forests and parks throughout the country. Indeed, as the court below noted (Pet. App. 22), so-called revocable permits seem to be frequently employed to avoid the 80-acre limitation on the use of national forest land. While the other two issues involve statutes applying specifically to Sequoia National Game Refuse and Park, they too have broader significance. All four issues warrant review by this Court due to the importance of preserving national park, refuge, and forest lands for the Congressionally specified purposes for which they were created.

3. The Preservation of Sequoia National Refuge, Forest and Park Is of Such Importance as to Justify Review by this Court

This case involves the actions of defendants in allowing Walt Disney Productions to built a large resort in Mineral King Valley and allow construction of a highway and electric transmission line through Sequoia National Park. The Valley is in the Sierra Nevada Mountains of California and is surrounded on three sides by the National Park. While geographically and ecologically the Valley is part of the Park, Congress did not include the Valley in the Park because of the existence of mining claims. Congress did recognize its importance to the Park, however, by designating the Valley, which is part of Sequoia National Forest, as constituting, in addition, the Sequoia National Game Refuge. 16 U.S.C. 688.

If defendants and the developer are allowed to proceed, magnificent natural and scenic resources of this country will be irrevocably lost. Hotels, restaurants, parking, ski lifts, ski slopes and other recreational facilities will be spread over 13,000 acres of the Valley and nearby mountains. As many as 14,000 visitors will use the Valley daily, twice as many as now use Yosemite Valley on busy days. A major highway and transmission line will be cut across Sequoia National Park to Mineral King.

This Nation in the last few years has become increasingly concerned with the serious environmental dangers facing us, including the need to preserve the scenic and wildlife resources which are still left. Congress has recognized these dangers in several major pieces of legislation and particularly the National Environmental Policy Act. That Act, *inter alia*, places on the Federal Government the responsibility to "preserve important . . . natural aspects of our national heritage." 42 U.S.C. 4331 (b)(4).

We submit that the proposed destruction of significant portions of the Sequoia National Game Refuge, Forest and Park is of such importance as itself to justify this Court in

granting the writ of certiorari. Even if the decision below were not in conflict with holdings of other federal courts of appeals and raised no major issues of continuing importance in future environmental litigation, the subject matter of this case requires review by this Court.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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November, 1970

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[6]While the opinion of the court of appeals is not entirely clear, it appears that the district court on remand will be obliged to dismiss the complaint because, in the view of the court below, the plaintiff both lacked standing and failed to state a cause of action. However, even if plaintiff is permitted to amend the complaint to improve its position with regard to standing (by alleging and showing that it has members who use the Sequoia National Refuge, Forest and Park) and to offer further evidence on the substantive issues, the court of appeals did deny the preliminary injunction. If plaintiff is allowed to continue the litigation, irreparable damage will still occur as the developer starts work in the Valley to build the resort and the State of California begins to construct the highway across Sequoia National Park. It is therefore essential for this Court, in order to prevent this damage, to grant the writ and either (a) hear the cause on the merits or (b) continue the present injunction until plaintiff has had the opportunity to amend its complaint in the district court and has received a full hearing on its prayer for a permanent injunction.

Supreme Court, U.S.
FILED
DEC 4 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~000~~ 70-34

SIERRA CLUB, a California corporation,

Petitioner,

vs.

WALTER J. HICKEL, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,

Respondents.

Brief Amicus Curiae of the County of Tulare in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 939

SIERRA CLUB, a California corporation,

Petitioner,

vs.

WALTER J. HICKEL, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,

Respondents.

Brief Amicus Curiae of the County of Tulare in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

STATEMENT OF FACTS

Mineral King is a valley in the Sierra Nevada Mountains of California, east of Visalia and bounded on three sides by the Sequoia National Park. During the last century it was a silver and gold mining center. In the early 1900's small hydroelectric facilities which are still in use were built at Mineral King, and for several decades it has been the summer retreat for many cabin owners.

Nearly all of the land at Mineral King is owned by the United States and is managed by the United States Forest Service as part of the Sequoia National Forest. For over twenty years Mineral King with its unique topography has been recognized as a potential site for one of the world's finest winter sports and ski areas. In 1965 the Forest Service solicited proposals for the construction and operation of public recreational facilities at Mineral King. The proposal of Walt Disney Productions was chosen from six submitted and Disney was granted a preliminary permit for the preparation of a master plan for the Mineral King recreational area. Disney committed $35 million to the development, the State of California proposes to spend $22 million for the improvement of the access road, and the Federal Economic Development Administration committed $3 million of economic development funds to construction of the access road.

In June, 1969, nearly four years after the Forest Service announced its solicitation of proposals, the Sierra Club brought an injunctive action, alleging several supposed deficiencies in the authority of the Secretaries of the Interior and Agriculture to permit a recreational area to be developed at Mineral King.

On interlocutory review of the preliminary injunction granted by the District Court, the Ninth Circuit first held that the Sierra Club lacked standing to maintain the action. It then proceeded to hold unanimously that the granting of the preliminary injunction had been an abuse of discretion, because there was little or no likelihood the Sierra Club could prevail on the merits in its technical assertions that the defendants were threatening to exceed the authority delegated to them by Congress.

The relevant portions of the statutes involved are set out in the Petition for Certiorari, Appendix C.

INTEREST OF THE AMICUS CURIAE

This brief of an *amicus curiae* is filed pursuant to Rule 42 of the Rules of the Supreme Court. Consent to the filing of this brief is not required, since it is filed by the County of Tulare, a political subdivision of the State of California, and is sponsored by the authorized law officer thereof, Calvin E. Baldwin, County Counsel.

The County of Tulare, the county in which Mineral King is located, has cooperated with federal and state authorities over several years in planning for the Mineral King recreational development. Land use planning is a critical concern of the County since approximately one-half of the land within its boundaries is in federal ownership and thus exempt from property tax. The County has encouraged the conservation of private agricultural lands under the California Land Conservation Act of 1965 at an enormous sacrifice in erosion of its property tax base. Tulare County is already an economically depressed area with high unemployment and a tax base too small to meet its growing requirements for public services. Only through completion of the Mineral King recreational area can the County correct its present depressed economic condition and absorb the tax revenue losses associated with its land conservation program.

SUMMARY OF ARGUMENT

I

Petitioner sought a preliminary and permanent injunction in the District Court alleging that the Secretaries of Agriculture and the Interior threaten to exceed the land management authority delegated to them by Congress. The District Court granted a preliminary injunction. On interlocutory appeal, the Ninth Circuit Court of Appeals

reversed on two grounds: it held that petitioner lacked standing to maintain the action; and it unanimously held that the District Court abused its discretion in granting a preliminary injunction because petitioner had failed to show a strong likelihood it would prevail on the merits. The Court of Appeals analyzed each of the contemplated acts which are alleged to exceed the statutory authority of the cabinet officers and concluded there was little or no likelihood that petitioner would prevail on any one of its assertions.

When a plaintiff seeks to enjoin administrative action and the public interest would be adversely affected by the decree, the plaintiff is required, as a condition to the granting of a preliminary injunction, to make a "strong showing that it is likely to prevail on the merits." Petitioner asserts that this standard is too high and erroneously argues that it need merely show that it has raised "serious, substantial, difficult and doubtful questions going to the merits." Even if petitioner's suggested standard were appropriate the granting of the preliminary injunction was an abuse of discretion, because there is little or no likelihood the petitioner can prevail on the merits.

This Court should not grant certiorari to consider a standing question when the Ninth Circuit has disposed of the case on independent grounds going to the merits.

II

The Ninth Circuit Court of Appeals held that petitioner lacked standing to bring this action and in doing so properly decided this case under *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970) and *Barlow v. Collins,* 397 U.S. 159 (1970). *Data Processing* holds that a plaintiff must meet two necessary conditions

to have "standing to sue": the administrative action which the plaintiff challenges must have caused or threatened to cause plaintiff "injury in fact"; and this injury must be to an interest of the plaintiff which is "arguably within the zone of interests to be protected or regulated by the statute . . . in question." Petitioner cannot satisfy these two tests. There is no injury in fact threatened to the Sierra Club by the proposed recreational use of federally-owned land in Mineral King, and none of the land management statutes cited by petitioner was enacted with a view to protecting the petitioner's bias for minimal recreational use of federal lands.

ARGUMENT

I

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THERE IS LITTLE OR NO LIKELIHOOD THAT THE PETITIONER CAN PREVAIL ON THE MERITS.

A. This Court Should Not Grant Certiorari to Consider a Standing Question in a Case Which Has Been Properly Disposed of on Alternative and Independent Grounds.

The Ninth Circuit decided that the Sierra Club lacked standing to maintain this action. However, the Ninth Circuit, going far beyond the threshold question of standing, looked to the merits of the lower court's decision, and unanimously held it was an abuse of discretion for the District Court to grant a preliminary injunction.

The Court of Appeals carefully analyzed each of the petitioner's substantive contentions and concluded that there is little or no likelihood the petitioner can succeed on the merits. It therefore vacated the order granting the preliminary injunction and remanded the case to the District Court. Since that part of the opinion below which concerns the merits is entirely independent of the discussion of standing, full scale review of the standing

issue by this Court will not affect the disposition of the case. The only foreseeable result of a reversal of the Ninth Circuit's decision as to standing would be, after remand to the trial court, a dismissal of the complaint on a motion for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure rather than dismissal on a motion pursuant to Rule 12(b)(6).

This Court is already subject to inordinate demands on its time and attention and should grant certiorari only when special and important reasons for doing so are shown. In a case such as this, in which the merits have been correctly resolved on grounds independent of a challenged procedural ruling, certiorari is properly denied. *The Monrosa v. Carbon Black, Inc.*, 359 U. S. 180 (1959). In *The Monrosa* this Court dismissed a writ of certiorari as improvidently granted, observing,

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeal is judicial, not simply administrative or managerial. 359 U.S. at p. 184.

B. The District Court Abused Its Discretion in Granting a Preliminary Injunction Because There Is No Strong Likelihood or Reasonable Certainty That the Petitioner Will Prevail on the Merits.

Petitioner contends that the Ninth Circuit applied an incorrect standard in determining that the District Court abused its discretion in issuing the preliminary injunction. The Ninth Circuit said that in order to obtain a preliminary injunction, "particularly against the discretionary action of an official of cabinet rank, the plaintiff must establish a strong likelihood or 'reasonable certainty' that he will prevail on the merits at a final hearing." Petition, App. A at 17. Petitioner claims that this standard is in conflict with the decisions of other circuits.

On the contrary, the circuit courts agree that when a plaintiff seeks to enjoin federal administrative action, it must make a "strong showing that it is likely to prevail on the merits." *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *accord, A Quaker Action Group v. Hickel*, 421 F.2d 1111, 1116 (D.C. Cir. 1969) ("substantial likelihood of success"); *North Atlantic Westbound Freight Association v. Federal Maritime Comm'n.*, 397 F.2d 683, 684-85 (D.C. Cir. 1968) ("strong showing that it is likely to prevail"); *Belcher v. Birmingham Trust Nat'l. Bank*, 395 F.2d 685, 686 (5th Cir. 1968) ("substantial showing of probable success"); *Baggett Transp. Company v. Hughes Transp., Inc.*, 393 F.2d 710, 716-17 (8th Cir. 1968) ("strong showing that it is likely to prevail"); *Airport Comm'n of Forsyth County v. CAB*, 296 F.2d 95, 96 (4th Cir. 1961) ("strong showing that it is likely to prevail"). In the *Quaker Action Group* case, *supra*, Chief Judge Bazelon for the District of Columbia Circuit said:

> The standards which should guide the decision to grant a preliminary injunction have been often stated. The movant must show a *substantial likelihood* of success on the merits, and that irreparable harm would flow from the denial of an injunction. In addition, the trial judge must consider the inconvenience that an injunction would cause the opposing party, *and must weigh the public interest as well.* 421 F.2d at 1116 (Emphasis added, footnote omitted).

A "substantial likelihood" of success on the merits (or a "strong likelihood" as the Ninth Circuit required in the present case (Petition, App. A. at 17)) should be a prerequisite to the imposition of a preliminary injunction where the plaintiff seeks to enjoin action by members of the President's cabinet on a subject which is within the Enumerated Powers of Congress (Article IV, Section 3,

Clause 2 of the Constitution) and which the Congress has expressly delegated to the executive branch.[1]

A "substantial likelihood" of success on the merits should also be required where the public and non-parties will be adversely affected by the preliminary injunction, and the District Court erred in refusing to consider the interests of the public and non-parties before issuing a preliminary injunction. This Court has ruled in connection with the issuance of a preliminary injunction that "it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect." (Footnote omitted) *Inland Steel Company v. United States,* 306 U.S. 153, 157; 83 L.Ed. 557, 560 (1939). Learned Hand applied this principle in 1919 as a District Judge in *Dryfoos v. Edwards,* 284 Fed. 596, 603 (S.D.N.Y. 1919), and more recently Justice Harlan did so sitting individually as Circuit Justice. *Breswick & Company v. United States,* 100 L.Ed. 1510, 1514 (1955).

The principle that the public interest must be considered in deciding whether to issue a preliminary injunction is particularly apt where the plaintiff seeks to enjoin federal administrative action. *Virginia Petroleum Jobbers Ass'n. v. FPC, supra.*

The Court in *Virginia Petroleum* said:

> . . . [W]e must determine whether, despite showings of probable success and irreparable injury on the part of petitioner, the issuance of a stay would have a *serious adverse effect on other interested persons.* Relief saving one claimant from irreparable injury, at

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1. Acts of August 25, 1916, March 4, 1911, April 9, 1924, and February 15, 1901, 16 U.S.C. §§ 1, 5, 8, 79 (Secretary of the Interior); Acts of March 4, 1915, June 4, 1897, and July 3, 1926, 16 U.S.C. §§ 497, 551, 688; Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 (Secretary of Agriculture).

the expense of similar harm caused another, might not qualify as the equitable judgment that a stay represents. 259 F.2d at 925 (Emphasis added).

The issuance of a preliminary injunction in this case has had "a serious adverse effect on other interested persons", namely, the residents of Tulare County, the citizens of the State of California, the users of recreational facilities in the United States in general and Walt Disney Productions.

The County of Tulare is a large, predominantly rural county located in central California with a total area of approximately 3,100,000 acres. Of this amount, 1,750,000 acres are forested land; the vast majority of the balance is farmland.

Tulare is not a rich county. On the contrary, it is an economically depressed region with high unemployment and a tax base inadequate to support the increasing demand for public services. Tulare County has been declared a redevelopment area under Title I of the Public Works and Economic Development Act of 1965, 42 U.S.C. §§ 3121-3226, because of its high unemployment.

Tulare County has encouraged the preservation of its agricultural lands under the California Land Conservation Act of 1965, Calif. Government Code, §§ 51200-51295, West Ed. 1966. Under the terms of this Act, land committed to continued agricultural use is assessed at its value based on that use, rather than on its potential developmental value. Within the next two years most of the privately owned land outside urban areas in the county will have been preserved from conversion to urban or suburban use, but at a substantial cost to the county in the form of a reduced tax base.

Losses associated with the County's land conservation program and lagging economy must be recouped elsewhere.

Recognizing this fact, the County has been involved for several years in planning for the Mineral King recreational area. When completed, the complex will generate an estimated $1.5 million annually in tax revenues for the County. The potential beneficial effects of the recreational area on the region's economy induced the Federal Economic Development Administration to contribute $3 million toward construction of the Mineral King access road.

Delay in commencement of the project will preclude early allocation of the tax revenues to finance needed social services. Spiraling construction costs and delay could also combine to jeopardize the commitments of the State of California and the developer to spend $60 million for the access road and recreational facilities. The losses associated with further delay can never be recovered but are wholly avoidable if this litigation is resolved expeditiously.

> Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes. . . . We must determine . . . how the Court's action serves the public best. *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d at 925.

In issuing the preliminary injunction which the Ninth Circuit ruled was an abuse of discretion, the District Court completely disregarded the public interest and the harm which its decree would inflict on non-parties. It enjoined as unlawful the issuance of the same type of permits previously issued for Aspen, Vail, Heavenly Valley, Jackson Hole and 80 other ski areas throughout the West, remarking merely:

> It is beside the point to argue, as do defendants, that a preliminary injunction in this case would interfere

with progress by raising doubts about the validity of similar arrangements made with respect to 84 other recreation areas, including 5 in California. This Court is not concerned with the controversy between so-called progressives and so-called conservationists. Record at 315.

This Court and most, if not all, of the circuits have endorsed and applied the principles set forth in *Virginia Petroleum,* that the plaintiff must show a substantial likelihood of success on the merits before an injunction which will adversely affect the public will be issued. *Permian Basin Area Rate Cases,* 390 U.S. 747, 773-74 (1968); *Belcher v. Birmingham Trust Nat'l Bank, supra; Baggett Transp. Co. v. Hughes Transp., Inc., supra; Nelson v. Miller,* 373 F.2d 474, 477-78 (3rd Cir. 1967); *Hamlin Testing Lab., Inc. v. AEC,* 337 F.2d 221, 222 (6th Cir. 1964); *Airport Comm'n. of Forsyth County v. CAB,* 296 F.2d 95-6 (4th Cir. 1961); *Associated Securities Corp. v. SEC,* 283 F. 2d 773, 775 (10th Cir. 1960); *Eastern Air Lines v. CAB,* 261 F.2d 830 (2d Cir. 1958). The district courts have had no difficulty in applying those principles, even where they have involved the district judge in the delicate balancing of public interest against private interests. *See, e.g. Erie-Lackawanna Railroad Company v. United States,* 259 F. Supp. 964, 972-73 (S.D.N.Y. 1966); *United States v. Mills,* 187 F. Supp. 314, 320 (D. Md. 1960).

Under this standard, the issuance of a preliminary injunction in this case was an abuse of discretion.

C. The District Court Abused Its Discretion in Granting a Preliminary Injunction Because Petitioner Has Not Even Raised "Serious, Substantial, Difficult or Doubtful Questions Going to the Merits."

Petitioner asserts that the Ninth Circuit applied too high a standard in requiring a strong likelihood of success

on the merits as a prerequisite to granting a preliminary injunction. According to petitioner, a plaintiff need only raise "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation" if the other requirements for preliminary relief are met. Petition at 19. However, petitioner has not even satisfied its own test since no serious, substantial, difficult and doubtful questions going to the merits have been raised.

The proposed acts of executive officers are, as a matter of law, within the scope of authority delegated to the executive branch by Congress. Article IV, Section 3, Clause 2 of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." This Congressional power has been delegated to the executive branch in hundreds of public land laws.

Petitioner complains that members of the President's cabinet threaten to exceed the authority delegated to them by Congress in the following ways:

That the Secretary of Agriculture has no authority to join term and revocable permits for development of Mineral King;

To which the Ninth Circuit unanimously said:

> *"We find little or no likelihood of success in opposing the proposed development upon the ground that there would be an illegal use of term and revocable permits."*

That the Secretary of the Interior has no authority to permit the State of California to improve the existing substandard Mineral King access road to all-weather standards;

To which the Ninth Circuit unanimously said:

> *"We cannot find in the appellee's contentions concerning this proposed road any degree of substantiality."*

That the Secretary of the Interior has no authority to permit construction of a power distribution line across a portion of Sequoia National Park;

To which the Ninth Circuit unanimously said:

"Again, with deference, we fail to find this a substantial issue upon which to base the grant of a preliminary injunction. It seems unlikely that the appellee could prevail as to such a contention."

That the Secretary of Agriculture has no authority to permit the Mineral King recreational development within an area of the national forests designated as a game refuge;

To which the Ninth Circuit unanimously said:

"We find no substance in this argument."

That the Secretary of the Interior may not issue a road construction permit without first holding public hearings;

To which the Ninth Circuit unanimously said:

"The matter of public hearings cannot be considered a substantial factor in this proceeding."

(1) The Secretary of Agriculture Has Authority to Combine Term and Revocable Permits for Recreational Areas Exceeding 80 Acres.

Under the terms of the preliminary permit issued by the Forest Service to the developer in February, 1966, the Forest Service proposes to issue two types of use permits: a thirty-year term permit covering not more than 80 acres of land, and a non-exclusive terminable permit covering further acreage. The terminable permit will actually be an annual permit, terminable at the discretion of the Forest Service. There are 84 ski areas in the United States now operating under such combined permits from the Secretary of Agriculture, and petitioner's assertion if adopted by this Court would invalidate each and every one of those permits.

The authority of the Secretary of Agriculture to grant annual use permits (so-called "terminable" or "revocable" permits) has its genesis in the Act of June 4, 1897, 16 U.S.C. § 551. *McMichael v. United States,* 355 F.2d 283 (9th Cir. 1965). That Act authorized the Secretary to make "rules and regulations" for the "occupancy and use" of the national forests, 16 U.S.C. § 551, and his authority to grant use permits has been confirmed by this Court and by the Attorney General. *United States v. Grimaud,* 220 U.S. 506 (1911); 25 Ops. Att'y Gen. 470 (1905). The Multiple-Use Sustained-Yield Act of 1960 codified existing practice by adding outdoor recreation as an appropriate use of Forest Service land. It stated the policy of Congress "that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed and wildlife and fish purposes." 16 U.S.C. § 528.

The authority for term permits to use and occupy up to eighty acres for periods not exceeding thirty years is derived from the Act of March 4, 1915, as amended in 1956. 16 U.S.C. § 497. Prior to 1956 term permits for hotel and resort use were limited by the 1915 Act to five acres of land and a duration of thirty years. Amendments increasing the acreage and term, as well as the purposes for which term permits could be granted, were sought by the Department of Agriculture, and finally obtained in 1956, in order to make financing more readily available for recreational improvements on national forests. The 1956 legislation was enabling legislation intended to broaden the authority of the Secretary of Agriculture, not, as petitioner asserts, restrictive legislation intended to limit the Secretary's authority to encourage public recreation on the national forests.

The House Agriculture Committee report on the 1956 amendments reflected an awareness of existing administra-

tive practices and a desire not to disturb the Secretary's basic authority under the 1897 Act to regulate the use and occupancy of the public lands. It said:

> The Department of Agriculture now has adequate authority to issue revocable permits for all purposes under the Act of June 4, 1897 (16 U.S.C. 551). Its authority to issue term permits, . . . would be broadened by S. 2216. . . ." H.R. Rep. No. 2792, 84th Cong., 2d Sess. (1956).

And in its report on the Multiple-Use Sustained-Yield Act of 1960, the House Agriculture Committee endorsed the established practices of the Forest Service in granting use permits for private investment in public facilities on forest lands:

> The enumeration of the resources in the bill is by broad categories. They include all of the various segments that go to make up the broad categories. The enumeration of these five broad categories is by resource rather than by uses, but is not to be construed as indicating that any recognized or authorized use of the national forests is to be prohibited and not to be continued. Outdoor recreational use, for example, may include . . . the issuing of both public and private special use and occupancy permits, such as has been the policy with respect to the national forests in the past. H.R. Rep. No. 1551, 86th Cong., 2d Sess. (1960).

The well established practice of the Forest Service of joining thirty-year term permits with revocable permits for winter sports areas is proper. The Ninth Circuit recognized that the 1956 legislation, enacted to stimulate private investment in public recreational facilities on the national forests, must not be twisted into a devise to block the Mineral King recreational area and to close dozens of other ski areas in Western United States.

(ii) The Secretary of the Interior Has Authority to Permit the State of California to Improve the Mineral King Access Road.

Petitioner erroneously contends that the Secretary of the Interior lacks the statutory authority to grant a permit to the State of California for the improvement to all-weather standards of the existing sub-standard county road crossing a six-mile wide portion of Sequoia National Park.

The authority of the Secretary of the Interior to grant a road permit to the State of California is inherent in the delegation by Congress to the Secretary of the power to "regulate the use of the Federal areas known as national parks" in the Act of August 25, 1916, 16 U.S.C. § 1. For decades the Secretary of the Interior has exercised this land management power by permitting the construction of roads traversing national parks.

In addition to the inherent power of the Secretary, the Act of April 9, 1924, 16 U.S.C. § 8 provides that:

> The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior.

(iii) The Secretary of the Interior Has Authority to Permit the Construction of a Power Distribution Line to Serve Mineral King.

Petitioner contends that the 1926 legislation expanding Sequoia National Park prohibits the Secretary of the Interior from granting any right-of-way for distribution lines through Sequoia National Park without first obtaining Congressional approval. Act of July 3, 1926, 16 U.S.C. § 45c (1960). The interpretation placed on Section 45c by the petitioner is untenable when the language is read in context.

Section 45c means that the Federal Power Commission cannot license construction of hydroelectric power genera-

tion facilities and associated primary transmission lines *within* the limits of Sequoia National Park without Congressional consent. There is specific authority in the Act of February 15, 1901, 16 U.S.C. § 79, for the Secretary of the Interior to grant revocable rights-of-way "through" Sequoia National Park "for electrical plants, poles, and lines for the generation and distribution of electrical power and for telephone and telegraph purposes." Ten years thereafter, in 1911, Congress delegated to the head of a department having jurisdiction over lands the authority to grant *term* rights-of-way "for electrical poles and lines . . . over, across and upon public lands." Act of March 4, 1911, 16 U.S.C. § 5.

In 1921 Congress restricted the licensing authority of the newly created Federal Power Commission to prevent inundation of high mountain canyons in national parks and monuments:

> . . . [N]o permit, license, lease or authorization for dams, conduits, reservoirs, powerhouses, transmission lines or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits as constituted March 3, 1921, of any national park or national monument shall be granted or made without specific authority of Congress. Act of March 3, 1921, 16 U.S.C. § 797a.

This section is a limitation only on the licensing power of the Federal Power Commission, not on the power of the Secretary of the Interior to grant rights-of-way and permits for power distribution lines under the 1901 and 1911 Acts. 16 U.S.C. §§ 5, 79.

Sequoia National Park was expanded in 1926, in part because of public concern that certain Sierra valleys might be inundated by reservoirs for hydroelectric power generation. The proscriptive language of the 1921 Act was copied

verbatim into the 1926 Act to *"prohibit the development of hydroelectric power* in the . . . enlarged park," (Emphasis added)[2] and was codified as the proviso in 16 U.S.C. § 45c. Thus, Sequoia National Park was insulated from the threat of Federal Power Commission licensing of dams and power plants within its boundaries.

Prohibition of licensing of hydroelectric power projects within Sequoia National Park was the sole purpose of Section 45c.[3] It was not intended to repeal the authority of the Secretary of the Interior to grant rights-of-way for distribution lines under the 1901 and 1911 Acts.

(iv) The Secretary of Agriculture Has Authority to Permit Outdoor Recreation in Sequoia National Game Refuge.

The 1926 Act expanding Sequoia National Park excluded Mineral King from the park, leaving it under Forest Service dominion. However, it established the Sequoia National Game Refuge to prohibit all hunting and trapping at Mineral King, except under regulations of the Secretary of Agriculture. Act of July 3, 1926, 16 U.S.C. § 688. The Sierra Club contends that the issuance of a permit for development of a recreational area violates this restriction on hunting and trapping.

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2. H.R. Rep. No. 583, 67th Cong., 2d Sess. 2 (1922) (to accompany H.R. 7452). "The city of Los Angeles has on file with the Federal Power Commission applications for six power sites within this proposed new area. The San Joaquin Light & Power Corporation has applied for two sites." Id. at 3. See also Hearings Before the House Committee on the Public Lands on H.R. 4095, 68th Cong., 1st Sess. 19, 39 (1924).

3. The language of Section 45c has been applied once, and then for the purpose for which it was intended. In 1963, in connection with Federal Power Commission re-licensing of its Kaweah No. 3 Project, the Southern California Edison Company was required to obtain legislation specifically authorizing the Secretary of the Interior to issue a permit for the continued operation, maintenance and use of hydroelectric facilities within Sequoia National Park. Pub. L. No. 88-47, 77 Stat. 70 (June 21, 1963).

The refuge legislation allows the Secretary of Agriculture to "permit other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which the game refuge is established." 16 U.S.C. § 688. Under that statutory directive, the Secretary of Agriculture, in the exercise of his discretion, has continued multiple-use management of the land. The Secretary has authorized game hunting at Mineral King to prevent range and property damage caused by the existing overpopulation of deer and bear. He now proposes to authorize a recreational development. A federal court should not "second-guess" the Secretary of Agriculture on wildlife and land management decisions which have been committed to his discretion by Congress.

(v) There Is No Requirement of a Public Hearing by an Agency of the Federal Government in Connection with the Location and Design of the Mineral King Road.

There is no merit to petitioner's contention that public hearings were required to be held regarding the location and design of the Mineral King access road. No statute or departmental regulation requires such hearings.

The last-minute policy statement of Secretary Udall, adopted without hearings only two days before he left office in January, 1969, was immediately and validly revoked by Secretary Hickel. Petitioner's suggestion that this revocation was itself ineffective because of a failure to hold hearings on the question of revocation is refuted by the statute upon which petitioner relies. Section 553 of the Administrative Procedure Act explicitly exempts from its notice and hearing requirements all "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(b).

Thus, both the adoption of the road hearing procedures on January 18, 1969, and their revocation on April 21, 1969, were exempt from the notice and hearing requirements of the Administrative Procedure Act.

In the absence of a departmental regulation, there is no obligation that a hearing precede administrative decisions regarding road locations. No statute specifically governing the Interior or Agriculture Departments contains such a provision. The Administrative Procedure Act, by its terms, does not apply to such forest management decisions. 5 U.S.C. § 553(a)(2). See *Duesing v. Udall*, 350 F.2d 748, 752 (D.C. Cir. 1965), cert. den. 383 U.S. 912; *McNeil v. Seaton*, 281 F.2d 931 (D.C. Cir. 1960); Reich, *The Public and the Nation's Forests*, 51 Calif. L. Rev. 381, 394-395 (1962).

In those few instances in which Congress has desired administrative hearings in connection with public land management decisions, it has specifically so provided in the relevant statute. *See, e.g.*, Classification and Multiple Use Act, 43 U.S.C. § 1411(a); Wilderness Act, 16 U.S.C. § 1132(d)(B).

II

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE SIERRA CLUB LACKS STANDING TO MAINTAIN THIS ACTION.

A. The Ninth Circuit Decision That the Sierra Club Lacks Standing Is in Harmony with Recent Decisions of this Court.

Petitioner contends that the Ninth Circuit's decision on standing conflicts with the controlling decisions of this Court and with recent decisions in other circuits. In arguing that the Ninth Circuit decision conflicts with decisions of this Court, petitioner refers to *Association of Data Processing Service Organization v. Camp*, 397 U.S. 150 (1970),

and *Barlow v. Collins,* 397 U.S. 159 (1970). No conflict exists.

Data Processing holds that a plaintiff must meet two necessary conditions to have "standing to sue." First, the action which the plantiff challenges must have caused or threatened "injury in fact." Second, this injury must be to an interest of the plaintiff which is "arguably within the zone of interests to be protected or regulated by the statute . . . in question." The plaintiffs in *Data Processing,* and in the companion case of *Barlow v. Collins,* satisfied both conditions; the petitioner in the instant case does not.

Plaintiffs in *Data Processing* were computer service organizations whose competitive position was directly threatened by administrative approval of the penetration of their market by national banking corporations. The Court held that plaintiffs had standing because one of the purposes of the relevant statute, the Bank Service Corporation Act of 1962, 12 U.S.C. § 1864, was to protect the economic interest of potential competitors by restricting banks from expanding into new markets. In *Barlow v. Collins,* plaintiffs were tenant farmers challenging regulations of the Secretary of Agriculture which would have increased the farmers' economic dependence on their landlords. Here again, plaintiffs were held to have standing since the injury was palpable and the statute, the Food and Agriculture Act of 1965, 7 U.S.C. (Supp. IV) § 1666(d), expressly directed the Secretary to protect the tenants' interests.

The case at bench is significantly different, as the Ninth Circuit apprehended. The Sierra Club is a corporation formed to promote its members' interests in conservation and outdoor recreation. Although the complaint alleged that these interests would be "vitally affected" by the various actions of the defendant administrators, it is apparent that any injury is substantially more diffuse and problematic

than in either *Data Processing* or *Barlow*. Petitioner is no more injured by the proposed Mineral King recreational area than it is by any other federal land or natural resource management decision with which it may happen to disagree.

More significantly, the statutes involved in this case were not enacted to codify the preference of some individuals for a policy of minimal recreational enjoyment of federal land. It is obvious that petitioner opposes use of any land at Mineral King for skiing or other winter sports. Since there are no applicable statutes which embody this particularized philosophy of recreation, and thus no interests of the petitioner which are arguably within the relevant "zones of interests", denial of standing was entirely consistent with the principles announced in *Data Processing*.[4]

B. The Ninth Circuit's Decision That the Sierra Club Lacks Standing Does Not Significantly Conflict with the Decisions of Other Circuits.

Petitioner asserts that the opinion of the Ninth Circuit conflicts with recent decisions of the Second Circuit and the District of Columbia Circuit, specifically: *Environmental Defense Fund Incorporated v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970); *Citizens Committee for Hudson*

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4. There is no merit to petitioner's suggestion that the Ninth Circuit disregarded *Data Processing's* teaching that the plaintiff's interest need not be merely economic. This was explicitly acknowledged by the court below (Petition App. A. at 16) which held, nevertheless, that Petitioner lacked standing. *Data Processing* does *not* hold that anyone with an interest in aesthetics or conservation has, *therefore,* standing to challenge all administrative actions which distress him and which have an aesthetic impact. This Court held only that the interest sought to be protected by the complainant "at times may reflect 'aesthetic, conservational and recreational' as well as economic values." (397 U.S. at p. 153). The obvious corollary of this principle is that *at other times* such an interest will not be sufficient, depending upon the provisions of the governing statute. As already noted, the statutes governing the defendants' conduct were not enacted to protect the Sierra Club's corporate aesthetics or philosophy.

Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970); and *Scanwell Laboratories, Inc. v. Schaffer*, 424 F.2d 859 (D.C. Cir. 1970).

In each of these cases the Court held that the plaintiffs had standing to challenge administrative decisions as representatives of the public interest or "private attorneys general." See *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943) vacated on suggestion of mootness, 320 U.S. 707. The Court below rejected this theory as a basis for standing, holding that it is limited to cases in which a statute authorizes non-official persons to bring an action to prevent unauthorized official action. Petition, App. A, p. 17, n9. Since such a statute did exist in *Environmental Defense Fund Incorporated v. Hardin, supra,* the opinion below is consistent with that case.

Furthermore, this Court has already resolved the issue, indicating that the position of the Ninth Circuit is correct (*Association of Data Processing Service Organization, Inc. v. Camp, supra,* 397 U.S. 150, 154, n. 1).

The conflict, if any, between the decision of the Ninth Circuit in this case and decisions of the Second Circuit and D.C. Circuit are not of such consequence to constitute "special and important reasons" for granting certiorari in this case. The conflict is more in articulation of a general rule of standing than in the result which would be reached by different courts in a particular case. To the extent that a broad grant of standing to "public interest" litigants may be found in Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702, an element of judicial discretion has also been introduced to prevent nuisance litigation such as this. In *Scanwell Laboratories, Inc. v. Schaffer, supra,* the D. C. Circuit said:

> Of course it is true that the grant of standing must be carefully controlled by the exercise of judicial discretion in order that completely frivolous lawsuits

> will be averted. There must be a practical separation of the meritorious sheep from the capricious goats....

This case, in which the Ninth Circuit has unanimously held there is little or no possibility the Sierra Club could prevail on the merits, is the "capricious goat" referred to by the D.C. Circuit. Whatever difference there may be in articulation of reasons for its decision the result achieved by both courts would be the same; this case should be dismissed.

CONCLUSION

For the foregoing reasons your Amicus Curiae, the County of Tulare, respectfully requests that the Petition for Certiorari be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

SIERRA CLUB, PETITIONER

v.

WALTER J. HICKEL, INDIVIDUALLY, AND AS SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 939

SIERRA CLUB, PETITIONER

v.

WALTER J. HICKEL, INDIVIDUALLY, AND AS SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1–28) is not yet reported. The opinion of the district court (Pet. App. B, pp. 29–42) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1970. The petition for a writ of certiorari was filed on November 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, a national conservation organization, has standing to challenge decisions of the Secretaries of Agriculture and Interior authorizing a recreation project and appurtenant facilities in a national forest and park.

2. Whether petitioner's claim that the Secretaries of Agriculture and Interior lacked statutory authority to authorize the recreation project and facilities had sufficient substance to justify a preliminary injunction.

STATUTES INVOLVED

The relevant portions of Section 1 of the Organic Administration Act of June 4, 1897, 30 Stat. 35, 16 U.S.C. 551; Sections 1 and 2 of the National Park Service Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. 1, 2; Section 1 of the Act of April 9, 1924, 43 Stat. 90, 16 U.S.C. 8; Section 2 of the Act of September 25, 1890, 26 Stat. 478, as amended, 16 U.S.C. 43; Section 3 of the Act of July 3, 1926, 44 Stat. 820, 16 U.S.C. 45c; the Act of March 4, 1915, 38 Stat. 1101, as amended, 70 Stat. 708, 16 U.S.C. 497; Sections 1 and 4 of the Multiple-Use Sustained-Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. 528, 531; Section 6 of the Act of July 3, 1926, 44 Stat. 821, as amended, 16 U.S.C. 688; and the Act of March 4, 1911, 36 Stat. 1253, as amended, 16 U.S.C. 5, are set forth as an appendix to this brief.

STATEMENT

Sequoia National Forest (including the Sequoia National Game Refuge, which is coextensive with the forest as to all forest lands in issue in this case) and the adjacent Sequoia National Park belong to the United States.

Congress has placed the administration of the Forest and Game Refuge in the Department of Agriculture and the administration of the Park in the Department of the Interior, to be exercised, respectively, under the direction of the Secretaries of Agriculture and Interior, subject to the provisions of 16 U.S.C. 1, 2, 5, 8, 497, 528, 531, 551 and 688. Additional restrictions are placed on the Secretary of the Interior with respect to the Park by the provisions of 16 U.S.C. 43 and 45c.

In February 1965, the Forest Service issued a prospectus inviting bids for development of a recreational project in Mineral King Valley in Sequoia National Forest and Game Refuge. In January 1969, the Forest Service chose the plan submitted by Walt Disney Productions, one of five bidders. The Disney plan involved an expenditure of about $35 million. Major facilities for up to 14,000 daily visitors (such as motels, restaurants, parking lots and swimming pools) were to be constructed on about 60 acres under a 30-year term permit. Auxiliary facilities, such as ski trails and lifts, would be constructed within a 13,000-acre area of the Forest and Game Refuge under a nonexclusive, revocable, special use permit. Clause 15 of the special use permit provides that it "may be terminated upon breach of any of the [numerous] conditions herein or at the discretion of the regional forester or the Chief, Forest Service." [1]

In connection with the project, the Department of the Interior proposed to issue a revocable permit to

[1] The 30-year term permit is not terminable at discretion, but may be terminated for breach of numerous specified conditions, including many designed to protect environmental values.

the State of California to improve and partially reroute an existing, substandard access road 9.2 miles across the adjacent Sequoia National Park and to grant a right-of-way for a 66,000-volt electrical transmission line through the park.

Sierra Club, declaring that it had a "special interest in the nature of the uses proposed in the Sierra Nevada Mountains on behalf of the general public," brought suit against both Secretaries and their subordinates, seeking to enjoin construction of the recreation project.

The complaint against Agriculture alleged that the Secretary's issuance of permits for the ski resort violated the Act establishing the National Game Refuge, 16 U.S.C. 688; exceeded the authority for recreational use and occupancy conferred by 16 U.S.C. 497 and 551; and violated the Forest Service's own regulations as to public hearings, 36 C.F.R. 211.20–211.119.

The complaint against Interior alleged that the plan to replace a 9.2-mile segment of an existing 20-mile route and the decision to permit construction of a transmission line across the park were illegal under the Act establishing the Park, 16 U.S.C. 41, 43, 45c.

The district court found that Sierra Club had standing as a plaintiff to seek injunctive relief because of its general interest in conservation matters. On the merits, it held that the Club had raised questions concerning possible excess of statutory authority "sufficiently substantial and serious to justify a preliminary injunction," which it granted against both Secretaries.

On appeal, the court of appeals reversed on both aspects of the district court's holding. With respect to

standing, the majority found that the Club's asserted interest, as stated in its complaint, was entirely abstract, and hence insufficient to support the litigation. On the merits, the court was unanimous that no sufficient showing had been made to warrant the district court's granting of preliminary relief. On the basis of an established practice of combining term and revocable permits to create ski areas, it found no substantial reason for doubting the authority of the Secretary of Agriculture to issue those permits. Regarding the challenged actions of the Secretary of the Interior, the court stated (Pet. App. 24): "We know of no law and find little logic in a contention that a twisting, substandard, inadequate road through 9.2 miles of the park is legal but that an improved all weather two lane highway along a new but approximately parallel alignment is illegal." Nor did the court find it likely that the Club could prevail in its contention that the Secretary of the Interior was not authorized to grant permits for a transmission line right-of-way. Finally, the court found no substance to the argument that the project would interfere with the Game Refuge.

ARGUMENT

1. The question whether the Sierra Club, on its complaint as drafted, has alleged facts sufficient to show standing to bring this action does not warrant review in this Court. That holding is a narrow one, simply that the Sierra Club has not alleged sufficient facts to show that it or its members would be concretely injured or aggrieved by the proposed administrative

action—in other words, that there has been no "injury in fact," as required to establish standing under this Court's cases. *Data Processing Service* v. *Camp*, 397 U.S. 150, 152. Even if such a conclusion were in error, it is in the nature of a finding of fact, of the sort which this Court has frequently indicated does not warrant exercise of its certiorari jurisdiction.

Moreover, the standing issue here is not dispositive. The court of appeals carefully considered and resolved the merits of the dispute. To paraphrase the remarks of *amici* The Wilderness Society *et al.*, Br. at p. 4, n. 1, even if the Ninth Circuit is wrong, and national conservation organizations do have standing on the basis of such bare-bones allegations as were made in this case, this will affect only one holding, not the decision, of the court of appeals.

Finally, the asserted conflict among the circuits over the standing issue is not of such magnitude as to override this consideration. This Court has already indicated as much by its recent denial of certiorari in a petition raising the other side of the "conflict," *Parker* v. *Citizens Committee*, No. 614, this Term, certiorari denied, December 7, 1970. In its parallel petition, *Volpe* v. *Citizens Committee*, No. 615, this Term, denied the same day, the government did not raise the standing question asserted by New York State in *Parker*. Any disagreement between the circuits on that issue seemed too oriented to the facts of particular cases, and too close to this Court's recent

decisions in *Data Processing Service* and other like cases, to warrant the assertion that it was of an importance which required this Court's attention. We persevere in that view today. Of course, should the Court find review of the substantive issues raised in the petition warranted, the asserted issue of standing would also be appropriate for review. But of itself, in the circumstances of this case, it does not warrant the Court's attention.

2. The issues which go to the heart of the proposed development are those which concern the actions of the Secretary of Agriculture in administering the Sequoia National Forest and Game Refuge. These are, first, the contention that it is illegal for the Secretary to conjoin term and revocable permits in authorizing the creation of a ski area on national forest lands; and, second, that creation of a ski area is necessarily inconsistent with the congressionally required use of these lands as a game refuge. As to each, the court of appeals correctly concluded that the petitioner had shown "neither a reasonable certainty that it will prevail nor irreparable injury." Pet. App. 18.[2]

[2] Petitioner claims that this is too stringent a test for the granting of preliminary injunctive relief, and in conflict with the decisions of another circuit. But in emphasizing a portion of the quoted passage from *Unicon Management Corp.* v. *Koppers Company*, 366 F. 2d 199 (C.A. 2), Pet. at 19, petitioner acknowledges the correctness of a rule that one or the other of these factors—reasonable certainty and irreparable injury—must exist. The finding of the court of appeals was that *neither*

Any challenge to the Secretary's authority must overcome Congress' plenary power to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Const. Art. IV Sec. 3. *Gibson* v. *Chouteau,* 13 Wall. 92, 99; *Alabama* v. *Texas,* 347 U.S.C. 272, 273–274. This power is delegable and has here been delegated to the Secretaries of Agriculture and Interior. *Best* v. *Humboldt Mining Co.,* 371 U.S. 334, 336–338; *Boesche* v. *Udall,* 373 U.S. 472, 476; *United States* v. *Grimaud,* 220 U.S. 506.

Congress has authorized the Secretary of Agriculture "to regulate [the] occupancy and use" of national forests. 16 U.S.C. 551. The Multiple-Use Sustained Yield Act of 1960 directs him to accomplish this by balancing many potential uses of national forest lands: outdoor recreation, range, timber, watershed and wildlife and fish purposes. 16 U.S.C. 528. He is authorized to issue 30-year leases for up to 80 acres

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had been shown, and that therefore preliminary relief was not proper.

Nor is the question of "irreparable injury" answered by showing that there may be certain irreversible impacts on the environment or, more properly, particular features of it. The injury which must be demonstrated is injury *to the plaintiff,* which tips the balance of hardship decidedly toward him. *Ibid.* But, as the court of appeals held in relation to the issue of standing, petitioner thus far has succeeded in showing no more than an abstract affront to its interests; the other side of the balance of hardship is represented by the more than 100,000 skiers and others whose interests are being frustrated, and the Secretaries of Agriculture and Interior, whose administration of federal lands on behalf of all citizens is being impeded. The court was correct in concluding that no "irreparable injury" had been shown.

of national forest to be used for "hotels, resorts and any other structures or facilities necessary or desireable for recreation." 16 U.S.C. 497. And he has, in addition, power to permit the use of larger areas of the public domain through nonexclusive, revocable special use permits for such purposes as ski slopes and attendant equipment, so long as that is consistent with national forest purposes. 16 U.S.C. 551.

This last power, in particular, is sustained by long and recognized administrative practice. As the court of appeals noted (Pet. App. 22), there are at least eighty-four recreational developments on national forest lands which combine use of a fixed-term lease for lands on which permanent structures are erected and revocable permits for surrounding lands used for recreation consistent with national forest purposes.[3] That practice is known to Congress, which recognized that the Secretary "now has adequate authority to issue revocable permits for all purposes under the Act of June 4, 1897 (16 U.S.C. 551)," H. Rep. No. 2792, 84th Cong. (1956) 2d Sess. p. 2 [1956] U.S. Code Cong. and Admn. News, p. 3635], when it enlarged

[3] Some recreation projects, the court noted, exceeded 6,000 acres. The Forest Service has, since 1908, authorized issuance of revocable special use permits for such uses as residences, farms, dairies, schools, churches, telephone and telegraph lines, stores, saw mills, factories, hotels, summer resorts, dams, reservoirs, water conduits and power lines. Many of such structures were costly. The Forest Service has granted approximately 62,000 revocable permits authorizing 80 different uses of national forest lands. Management Policy and Other Problems of the National Forests, Hearings before the Subcommittee on Forests of the Committee on Agriculture, House of Representatives, 90th Cong., 1st Sess. (June 13–16, 1967), pp. 2–4.

from five to eighty acres the limit on land leasable for a fixed term and for permanent structures. In this context, surely, the court of appeals was correct in finding it unlikely that the plaintiff would succeed. *Udall* v. *Tallman*, 380 U.S. 1, 16.

The Secretary's broad discretion to administer the public lands is, in itself, an indication that his actions are entitled to deference. "* * * [W]here the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms, the very construction of the statute is a distinct and profound exercise of discretion * * *. We then must infer that the decision to act or not to act is left to the expertise of the agency burdened with the responsibility for decision." *Panama Canal Co.* v. *Grace Line Inc.*, 356 U.S. 309, 318; see, also, *Boesche* v. *Udall*, 373 U.S. 472, 486; *Thompson* v. *Consolidated Gas Co.*, 300 U.S. 55, 69; *McMichael* v. *United States*, 355 F. 2d 283 (C.A. 9). Here, the court of appeals was able to assure itself that the Secretary had shown "evidence of great concern for the ecology of the area and the preservation and conservation of natural beauty and environmental features. * * *" Pet. App. 23. Once it appeared clear that the Secretary was not acting in breach of some plain duty, it followed that preliminary injunctive relief would be improper.

Finally, the legislation designating Sequoia National Forest a game refuge, 16 U.S.C. 688, does not segregate it from other national forests as a place where, in particular, a ski resort or other recreational enterprise may not be authorized. The legislation spe-

cifically states that nothing contained in it "shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established." As has already been noted, the Secretary carried out this obligation by the insertion of conditions on both the 30-year fixed term lease and the revocable special use permit to assure that animal habitat and game would be protected. Petitioner asserts that no formal "finding" has been made that this use is consistent with the game refuge. But the statute requires no administrative proceeding, and so the action of the Secretary in authorizing the project, on stated conditions which reflect concern for the ecology of the area, must be taken as embodying any necessary finding. *Thompson* v. *Consolidated Gas Co., supra.* The holding of the court of appeals, correct on this record and a matter which would not ordinarily warrant review in this Court, was that petitioner had not shown a likelihood of prevailing in showing that that implicit finding was in error.

3. The challenges to the authority of the Secretary of the Interior arise from the need to use the Sequoia National Forest as an access route, both by road and for necessary power, to the Mineral King Development. These challenges do not go to the project itself; but if petitioner could block road access to the project, or the supply of electrical power, it is evident that the project would be severely inhibited. The case in this respect perhaps resembles the situation in *Parker* v. *Citizens Committee* and *Volpe* v. *Citizens Committee,*

supra. There, too, citizen groups sought to block a major development project on essentially technical grounds. In that case, they were able to persuade the court of appeals that their view of what the statutes required was correct, and it followed that the road project in question could not be authorized until those requirements were met. This Court found that question of statutory construction insufficient to warrant review, although a major project turned on it. Here, too, the statutory questions are of relatively minor import, although a substantial development could be blocked if petitioner's view of them were adopted. Petitioner failed to convince the court that its view was so likely to prevail as to warrant the granting of preliminary relief. That outcome raises no question of an importance warranting review in this Court.

Regarding the proposed improvement of highway access to Mineral King, petitioner's position is, essentially, that the Secretary of the Interior has no authority to permit construction of roads for transportation through, as distinct from "within" or "around," a national park. While the Department itself discourages such roads, neither the Department's policy nor the statute forbids them.[4] What both require is

[4] Section 4(f) of the Department of Transportation Act, as amended, 82 Stat. 824, 49 U.S.C. (Supp. V) 1653(f), and Section 138 of the Federal-Aid Highway Act, 23 U.S.C. (Supp. V) 138, which are before this Court in *Citizens to Preserve Overton Park* v. *Volpe*, No. 1066, this Term, are not applicable in this case, and petitioner does not rely upon them. The proposed highway through the park will be built using only state funds, and in no respect comes within the authority of the Secretary of Transportation. The authority of the Secretary of the Interior to construct roads and trails in national parks is conferred by 16 U.S.C. 8.

that any road be constructed in a manner which will "conserve the scenery and the natural and historic objects and the wild life therein" and "leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 1. The court of appeals found the proceedings in this case insufficient to establish a probability that the road would not be so constructed. It remains open to petitioner, if it can establish its standing, to show that the road will, in fact, be contrary to the statutory standard. The issues presented, essentially factual, involve no matters of the importance required by this Court's rules.[5]

Unquestionably, a different conclusion would have to be reached had the departmental regulations adopted in the last days of an outgoing administration not been revoked. As petitioner points out, those regulations would have required public hearings of a kind which have not been held. The contention that the procedural requirements were not revoked, however, is frivolous; and as the court of appeals pointed out, the public in fact had opportunities to be heard on the road and its design even before those requirements were adopted.

Finally, the question whether the proposed electric facilities were "transmission lines" requiring congressional approval under 16 U.S.C. 45c does not require review in this Court. Like the question whether certain roadworks in the Hudson River would be "dikes" or "causeways," the meaning for which petitioner

[5] A further factor is that the road in question is designed to replace an existing, inadequate facility, rather than to initiate road contact between two points.

contends is a possible one. But the meaning adopted by the court—that the Section applies only to the construction and development of hydroelectric facilities—is more convincing in view of both the Section's history, set out in the Brief *Amicus Curiae* of the County of Tulare, pp. 16–18, and the existence of 16 U.S.C. 5, which permits granting rights of way through national parks generally for the transmission of electrical power. Section 45c, in any event, has no application outside the Sequoia National Park. The issue how it should be construed, presented here at a preliminary stage, lacks the importance required for review in this Court.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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DECEMBER 1970.

APPENDIX

STATUTES INVOLVED

Section 1 of the Organic Administration Act of June 4, 1897, 30 Stat. 35, 16 U.S.C. 551, reads in pertinent part as follows:

> The Secretary of Agriculture * * * may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; * * *.

Sections 1 and 2 of the National Park Service Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. 1, 2, read in pertinent part as follows:

> There is created in the Department of the Interior a service to be called the national Park Service, * * *. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified * * * by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.
>
> * * * In the supervision, management, and control of national monuments contiguous to national forests the Secretary of Agriculture may cooperate with said National Park Service to such extent as may be requested by the Secretary of the Interior.

Section 1 of the Act of April 9, 1924, 43 Stat. 90, 16 U.S.C. 8, provides:

> The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior.

Section 2 of the Act of September 25, 1890, 26 Stat. 478, as amended, 16 U.S.C 43, provides, in relevant part:

> Sequoia National Park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition. * * *

Section 3 of the Act of July 3, 1926, 44 Stat. 820, 16 U.S.C. 45c, provides:

> Nothing contained in section 45a or 45b of this title shall affect any valid existing claim, location, or entry established prior to July 3, 1926, under the land laws of the United States, whether for homestead, mineral, right-of-way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land: *Provided,* That under rules and regulations to be prescribed by him the Secretary of the Interior may issue permits to any bona fide claimant, entryman, landowner, or lessee of land within the boundaries established by sections 45a–45e of this title to secure timber for use on and for the improvement of his land; and he shall also have authority to issue, under

rules and regulations to be prescribed by him, grazing permits and authorize the grazing of livestock on the lands within said park at fees not to exceed those charged by the Forest Service on adjacent areas, so long as such timber cutting and grazing are not detrimental to the primary purpose for which such park is created: *Provided,* That no permit, license, lease or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress.

The Act of March 4, 1915, 38 Stat. 1101, as amended, 70 Stat. 708, 16 U.S.C. 497, reads in relevant part as follows:

> The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; * * *.

Sections 1 and 4 of the Multiple-Use Sustained-Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. 528, 531, read in pertinent part as follows:

> It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528–531 of this title are declared to be supplemental to, but not in deroga-

tion of, the purposes for which the national forests were established as set forth in section 475 of this title [Act of June 4, 1897, 16 U.S.C. 475]. * * *

* * * * *

As used in sections 528–531 of this title, the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

Section 6 of the Act of July 3, 1926, 44 Stat. 821, as amended, 16 U.S.C. 688, reads in pertinent part as follows:

All parts of township 17 south, ranges 31 and 32 east, and township 18 south, range 31 east, Mount Diablo base and meridian, which are north of the hydrographic divide passing through Farewell Gap, and which are not added to and made part of the Sequoia National Park by the provisions of 688–689d of this title, are designated as the Sequoia National Game Refuge, and the hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of the United

States within the limits of the said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture; * * * and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and the rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established.

The Act of March 4, 1911, 36 Stat. 1253, as amended, 16 U.S.C. 5, reads in pertinent part:

> The head of the department [of the Interior] * * * be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way * * * over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power * * *.

U.S. GOVERNMENT PRINTING OFFICE: 1970

IN THE

Supreme Court of the United States

October Term, 1970

No. 70-34

SIERRA CLUB, a California corporation,

Petitioner,

vs.

WALTER J. HICKEL, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,

Respondents.

Motion for Leave to File Brief Amicus Curiae on Behalf of United States Ski Association and Far West Ski Association in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1970
No. 939

SIERRA CLUB, a California corporation,

Petitioner,

vs.

WALTER J. HICKEL, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,

Respondents.

Motion for Leave to File Brief Amicus Curiae on Behalf of United States Ski Association and Far West Ski Association in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Supreme Court of the United States:

The United States Ski Association and the Far West Ski Association, hereby respectfully move for leave to file a brief *amicus curiae* in this case in support of respondents, as provided in Rule 42 of the Rules of this Court. Respondents have consented to the filing of such a brief. Petitioner has not.

The Far West Ski Association ("Far West") is one of eight divisions of the United States Ski Association. Far West membership totals approximately 27,400 while the United States Ski Association represents over 109,000 American skiing enthusiasts.

The United States Ski Association and its regional divisions are nonprofit organizations which are the sanctioning bodies providing training, equipment, and financial support to the United States Ski Team in the winter Olympic Games and to United States teams in international competition during non-Olympic years.

The United States Ski Association and its divisions also engage in a number of activities designed to advance the sport as the major organization representing the recreational skiing public.

Representative examples of such activities are the publication of regional and national magazines and newspapers devoted to the promotion of the sport, funding and directing the National Ski Patrol System and local ski patrols in their activities with safety programs and avalanche control, certification of qualified ski instructors, maintaining high standards of ski instruction through the agency of the United States Ski Instructor's Association and its divisional counterparts, administering the United States Ski Coaching System and its divisional counterparts, serving as a liaison between the ski operators, the National Park Service, the United States Forest Service, and various state and local public and private agencies in the development of facilities and equipment and in fostering skiing safety, and promoting ski touring and mountaineering programs designed to achieve greater public appreciation and enjoyment of our wilderness areas.

The movants represent not only the skiing athlete but also the recreational skiing public and thus the entire spectrum of the sport.

One of the basic issues posed by this case concerns the Secretary of Agriculture's discretionary manage-

ment authority to issue a combination of term and revocable supplemental permits on Forest Service lands substantially similar to those under which over 80 ski resorts throughout the nation are presently operating.

Naturally, this case is of great importance to those persons represented by movants because of its obvious effect upon the Mineral King project and other skiing areas and by virtue of the fact that the Petitioner is atempting to overturn the Ninth Circuit overruling of the District Court's order granting a preliminary injunction enjoining issuance of a plan proposed by Walt Disney Productions, Inc., in and near Mineral King Valley in the Sequoia National Game Refuge located within the Sequoia National Forest in California.

And, this case has implications extending far beyond the situation now before the Court. Accordingly, as the principal spokesmen for the American skier, movants desire the opportunity to present their views on this matter to the Court. While movants are deeply concerned and in agreement with all of the issues raised by the respondents, movants' *amicus curiae* brief, presenting an in depth analysis of this issue and its ultimate effect on the national skiing public, industry and economy, dissimilar from the presentation of respondents, will avoid duplication and principally treat the issue of the Secretary's authority to issue a combination of term and revocable supplemental permits for Forest Service lands, substantially similar to those permits affecting the majority of skiing areas throughout the nation, which are not unlike that proposed for issuance to Walt Disney Productions, Inc. in the instant case pursuant to the Organic Administration Act of June 4, 1897, sec. 1, 30 Stat. 35, 16 U.S.C. sec. 551, and the Act of March 4, 1915, 38 Stat. 1101,

as amended by the Act of July 28, 1956, 70 Stat. 708, 16 U.S.C. sec. 497. McMichael v. United States, 355 F. 2d 283 (9th Cir. 1965).

The movants' *amicus curiae* brief will also aid the Court's evaluation of Petitioner's allegations that, as a matter of law, the supplemental permit would not be revocable at will.

The Ninth Circuit held that the Secretary in fact and in law had the authority to issue the subject permit and overruled the District Court's holding that the Secretary does not have the authority to issue revocable permits of this type under 16 U.S.C. 551.

Wherefore, it is respectfully prayed that this motion for leave to file a brief *amicus curiae* be granted.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 939

SIERRA CLUB, a California corporation,
Petitioner,

vs.

WALTER J. HICKEL, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

ARGUMENT

The defendants and *amicus* Tulare County argue that neither the standing issue nor the substantive issues in this case warrant the time of this Court. They suggest that the Sierra Club's standing is not dispositive. Tulare also argues that the Ninth Circuit applied the proper test for the showing required to justify a preliminary injunction. They are wrong on all counts.

1. STANDING

The standing issue is dispositive as a matter of law since, if the Ninth Circuit decision on that point were upheld, the District Court could not entertain further proceedings. It is pure sophistry to argue that the standing issue is not dispositive because the Sierra Club could also lose the case on other issues. In effect, defendants ask this Court to postpone resolving the crucial standing issue over which the circuits are in conflict until a case in which it is the only issue comes along.

In this case, the Ninth Circuit denied the Sierra Club standing because it "does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened". (Pet. App. 10) We do not ask this Court to redecide whether the Sierra Club satisfied that erroneous test. We do ask this Court to decide that the Sierra Club met the true test of standing, as in *Parker v. Citizens Committee,* No. 614 and *Volpe v. Citizens Committee,* No. 615, in which certiorari was denied this term.

The sufficiency of the Sierra Club's complaint is not at issue. The District Court had affidavits, memoranda and the results of lengthy argument and answers to its questions available to it when it applied what it understood to be the law to resolve the question of standing.[1] Had

[1]The District Court found that the Sierra Club has standing not as erroneously stated by respondents "because of its general interest in conservation matters" (Def. B 4) but because it found that "[f]or many years the SIERRA CLUB by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested. One of the prin-

the District Court been located in the D.C. Circuit, or the Second Circuit, it would have been affirmed. See *Environmental Defense Fund, Inc. v. Hardin,* 428 F. 2d 1093 (D.C. Cir. 1970); *Citizens Committee for Hudson Valley v. Volpe,* 425 F. 2d 97 (2d Cir. 1970); *cert. denied* December 7, 1970; *Scanwell Laboratories, Inc. v. Shaffer,* 424 F. 2d 859 (D.C. Cir. 1970).

We ask this Court to grant the Writ to resolve the conflict.

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2. INJUNCTION STANDARDS

The Sierra Club's petition called attention to the conflict between the circuits on the standard governing the grant of preliminary injunction created by the Ninth Circuit's decision in this case. The Ninth Circuit required a showing of "reasonable certainty" that the Sierra Club would ultimately prevail. That holding is at odds with the generally accepted and far less stringent standard of *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F. 2d 738 (2d Cir. 1953), discussed at page 19 of the petition.

The suggestion that a higher standard is proper whenever the plaintiff seeks to enjoin federal administrative action is an erroneous generalization rooted in an inapplicable concept. The cases cited by Tulare show this. They derive, with a single exception, from *Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F. 2d 921 (D.C. Cir. 1958), which requires a "strong showing that [plaintiff] is likely to prevail on the merits of its appeal" when,

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cipal purposes of the SIERRA CLUB is to protect and conserve the national resources of the Sierra Nevada mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants." (Pet. App. 40)

having been ruled against in an administrative decision, it seeks to stay or enjoin the administrator from giving effect to the order pending an appeal. The higher standard applies to such cases because the stay is sought after plaintiff has lost on the merits. It then acts as an "intrusion into the ordinary processes of administration and judicial review." (259 F. 2d at 925).

Where, by contrast, the plaintiff has had no opportunity to be heard on the merits, the standard applied by the trial court is that of *Hamilton Watch Co. v. Benrus Watch Co., supra,* whether the defendant is a federal administrator or not. See *Baggett Transp. Company v. Hughes Transp., Inc.,* 393 F. 2d 710, 716-17 (8th Cir. 1968); *United States v. Moore,* 427 F. 2d 1020 (10th Cir. 1970).

Neither does *A Quaker Action Group v. Hickel,* 421 F. 2d 1111 (D.C. Cir. 1969) support application of a higher standard to this case. Upholding the trial court's grant of a preliminary injunction against the enforcement of federal regulations, the court in that case did not apply any special test. It noted with approval those cases which set forth the general requirements for granting a preliminary injunction. (421 F. 2d at 1116, f.n. 8) Those cases restate the rule of *Hamilton Watch Co. v. Benrus Watch Co., supra.*[2]

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[2]See, e.g., *Industrial Bank of Washington v. Tobriner,* 405 F. 2d 1321 (D.C. Cir. 1968), and *National Lawyers Guild v. Brownell,* 225 F. 2d 552 (D.C. Cir. 1955) where the court said, in a suit to enjoin an administrative act of the Attorney General: "A motion for preliminary injunction requires the court to determine whether there are substantial *questions* and whether there would be irreparable injury to one party or the other, and to balance the equities between the parties." (225 F. 2d at 554) (emphasis added)

Applying the proper standards, Judge Sweigert found "that plaintiff has raised questions . . . sufficiently substantial and serious to justify a preliminary injunction" and that it made "a sufficient showing of imminent and irreparable injury to require pendente lite relief." (Pet. App. 41, 42)

Tulare's suggestion that *Virginia Petroleum Jobbers Ass'n v. FPC, supra,* and its progeny require that a higher probability of success must be shown "before an injunction which will adversely affect the public will be issued" in favor of a private interest is not only inapplicable to this case in which the Sierra Club is seeking to protect a public interest, but erroneous as a matter of law.[3]

Parting company with *amicus* Tulare, the defendants correctly acknowledge that the "reasonable certainty" test is applicable to this case only if there was no threat of irreparable harm. In arguing that the Club was not threatened, they rely upon the erroneous test of standing applied by the Ninth Circuit.[4] With the Club's standing to represent the public interest confirmed by this Court, they will be forced to concede that the District Court was correct in finding a threat of irreparable harm to that public interest and that the District Court applied the proper test.

---

[3]Where a public interest is involved, the effect upon it of an injunction must be weighed, not against the probability of success, but against the irreparable harm to plaintiff's private interest if the injunction is not granted. *Virginian R. Co. v. System Federation R.E.D.,* 300 U.S. 515 (1936); *Yakus v. United States,* 321 U.S. 414 (1944)

[4]See footnote 2 (Def. B. 7-8).

Defendants' suggestion that the public interest in preventing irreversible damage to public lands contrary to the will of Congress is overbalanced by the effects of delay upon skiers lacks merit. Even if the law were, as it is not,[5] that the District Court is charged with considering interests not before it, defendants fall far short of inventorying the many public interests which are involved. Tulare County in its *amicus* brief adds one economic interest. It omits others. As examples, the prospect that the tremendous traffic attributable to the resort could produce smog and make Tulare County residents unhappy is a public interest. The diversion of 22 million dollars in State funds from Southern California freeways in order to pay for the Mineral King highway which could compound the problems of motorists also is a public interest.

Plainly, it was in the broadest interest of the public to preserve the status quo while the substantial issues which would determine the legality of the project could be determined.

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3. SUBSTANTIVE ISSUES

Defendants have challenged only a portion of legal argument advanced by the Sierra Club on substantive issues. Their brief contains errors which may have led them astray. Those errors on key factual issues underline why this Court must intervene not only as to the far-reaching issues of law, but in the exercise of its supervisory authority. The Ninth Circuit abused its discretion by attempting to dispose of the merits of the

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[5]cf. *Erie-Lackawanna Railroad Company v. United States*, 259 F. Supp. 964, 971 (S.D.N.Y. 1966), *rev'd on other grounds* 386 U.S. 372 (1967)

case, including substantial issues of fact, before either side had an opportunity to establish those facts with discovery and testimony.

a. Defendants erroneously suggest that Disney's major facilities would be located only on the 80 acres of National Forest land covered by the term permit issued pursuant to 16 U.S.C. §497. They refer specifically to parking facilities. (Def. B. 3)

The record shows that a five story parking structure, sewage treatment facilities and ski lifts would be included in those major features which would be located outside the 80 acres on land to be covered by the so-called "revocable", supplemental permit. (R. 55-64, 71) The District Court so found. (Pet. App. 31). The Ninth Circuit did not overrule this finding, simply avoiding it.

Defendants refer to the supplemental permit as revocable. The record shows it isn't. They quote from Section 15 of the supplemental permit which states that "this permit may be terminated upon breach of any of the conditions herein or at the discretion of the Regional Forester or the Chief, Forest Service". (Def. B. 3) They fail to point out that the administrative regulations under which the permit would be issued bar its revocation at will.[6]

Without lifts, sewage disposal facilities, roads, avalanche dams, the parking structure, and the other major facilities which necessarily would be located outside the

[6]Under the Forest Service Manual ("F.S.M."), termination is equivalent to revocation (F.S.M. 2716.3(2)). Any revocation becomes the subject of an appeal under 36 C.F.R. §§211.20-211.119 to test its grounds and to ascertain whether the exercise of discretion was reasonable.

80 acre limit, the 35 million dollar investment in the ski resort would be destroyed. Revocation of the permit covering these facilities would be unreasonable *per se* if not by the judgment of Agriculture, then certainly by the court to whom Disney ultimately could appeal. Defendants also fail to note that a permit terminated for breach of a condition may be restored, since the permittee is afforded an opportunity to cure after notice. (F.S.M. 2716.3)

If more than the plain wording of the 80 acre limit of 16 U.S.C. §497 is necessary to divine the intention of Congress, the legislative history of the section is helpful. Upon issuance of a Writ, that history will be offered to this Court to prove that Congressional resistance to an increase in the acreage limitation from 5 to 80 acres was overcome by Agriculture's representation that the increased acreage was necessary because the service facilities of recreational developments and winter sports facilities including their ski lifts "are often strung out . . . and need elbow room" (1948 U.S. Code Cong. Service, pp. 1337, 1338). See also 1956 U.S. Code Cong. Service, p. 3636.

When Congress increased the limit to 80 acres in 1956, it amended the section to require that in addition to hotels, resorts and structures, those acres must include "any . . . *facilities* necessary or desirable for recreation, public convenience or safety." (July 28, 1956, C. 771, 70 Stat. 708) (emphasis added).

There is no evidence that Congress knew of an administrative practice of permitting the location of major, indispensable facilities on land covered by the revocable permit when it amended the section, whatever it may

have known about the practice of combining term and revocable permits.

This was not affected by the Multiple-Use Sustained Yield Act of 1960, 16 U.S. §§528-531, which was intended not to repeal clear limits upon the power of Agriculture, but rather to make explicit that which had been implicit for many years, namely, that its responsibilities include management of National Forests for recreation, range and wildlife purposes as well as for preservation, watershed management and timber production.

Contrary to the strawman set up by defendants, the Sierra Club does not challenge the power of the Secretaries to combine term and revocable permits *per se*. Neither does it challenge the legality of existing recreational developments which involve a combination of term and revocable permits.[7]

No evidence has been offered to show either that existing projects include indispensable, major facilities on more than 80 acres, or, more importantly, that any such conduct has been brought to the attention of Congress since 1956. "To find significance in congressional nonaction under these circumstances is to find significance where there is none." *Toucey v. New York Life Insurance Co.*, 314 U.S. 118, 141 (1941).

The District Court correctly observed that if Congress, when enacting and amending the acreage limitation, had in mind that it could be circumvented or nullified in this

[7]A decision that the combination of permits at Mineral King is illegal need not have retroactive effect. The Court may order that it apply only as to Mineral King and prospectively. *Safarik v. Udall*, 304 F. 2d 944 (D.C. Cir. 1962), cert. denied 371 U.S. 901 (1962).

fashion, ". . . it could have spared itself time and trouble by omitting any area limitation or by otherwise indicating its intent." (Pet. App. 35)

b. The Secretary of Agriculture is barred by 16 U.S.C. §688 from authorizing the project on game refuge land at Mineral King because for him to have found, contrary to the finding of personnel of the California Fish and Game Commission (R. 119), that location of the huge resort in the small, fragile, congressionally protected game refuge would be a use consistent with its purposes would have been a clear abuse of discretion.

c. The Secretary of the Interior is barred by 16 U.S.C. §1, from approving the highway across the Park. He again attempts to induce disinterest on the part of the Court by recasting a critical issue of law as one of fact. In this instance, the Secretary assumes that he may authorize construction and operation of a highway across a National Park for any purpose, provided that construction is influenced by the conservation purposes of the statute. This would deprive the statute of any meaning. He acknowledges in his brief that the purpose of this highway would be to provide access to a resort outside the Park. Evidence in the record makes clear that construction would have a profoundly adverse effect upon the Park. (R. 185). We, therefore, are met with the ultimate legal issue with significance beyond Sequoia National Park: Whether the Secretary of the Interior may authorize a use or construction in a national park the purpose of which is not to "conserve the scenery and the natural and historic objects and the wildlife therein and . . . leave them unimpaired for the enjoyment of future gener-

ations." (16 U.S.C. §1.) Congress has said clearly that he may not.

The highway conservatively estimated to cost 25 million dollars is *not* proposed because an existing road is inadequate for present uses. The sole impetus for the highway was the project, and its illegality is not mitigated by the fortuitous circumstance that a segment of a much longer road already crossed the area in question when it was incorporated into the Park.[8]

d. Defendants do not deny that the District Court's interpretation that 16 U.S.C. §45(c) requires congressional approval of the proposed transmission line across the Park is a reasonable one. Instead, they seek to insulate it from this Court's attention by referring to the issue as local and therefore unimportant. It is important because the refusal of this Court to deal with it would tell defendants that they may continue to disregard the clearly expressed will of Congress with impunity.

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4. MANAGERIAL DISCRETION

The power of the Secretaries over property of the United States is not plenary, as suggested by defendants. They have only those powers granted by Congress and

---

[8]The highway would be on a new alignment. Defendants, in stating that the work of the State of California will be "to improve and partially reroute" the road, apparently have failed to consult the record, including the route study of the State of California (R. 115), as well as their reply brief, filed with the Ninth Circuit, in which they stated that "Professor Clarkeson of M.I.T., the Department's consultant, tried to follow the old road's contours, but this proved impracticable. The proposed road, therefore, will follow the old cut for only a short distance." (P. 12)

no more. *United States v. California,* 332 U.S. 19 (1946); *Udall v. Oil Shale Corporation,* 406 F.2d 759 (10th Cir. 1969).

Judicial deference to the interpretations of the executive occurs when he is acting within the limits, however broad, established by Congress. *Udall v. Tallman,* 380 U.S. 1 (1965)

Judicial reticence must end when, as threatened by Agriculture and Interior in this case, the executive attempts to act outside the limits of an unambiguous Congressional limitation or, when operating within those limits, he abuses his discretion by acting arbitrarily or unreasonably. *Ickes v. Underwood,* 141 F.2d 546 (D.C. Cir. 1944), *cert. denied* 323 U.S. 713 (1944). The cloak of his managerial discretion does not protect him from the consequences of these sins.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, the Writ of Certiorari should be granted.

Dated: January 1971.

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Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. ~~939~~ 70-34

SIERRA CLUB, a California corporation, *Petitioner*

vs.

ROGERS C. B. MORTON, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 939

SIERRA CLUB, a California corporation,
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vs.

ROGERS C. B. MORTON, individually, and as Secretary of the Interior of the United States; JOHN S. MCLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (A. 208-235) is reported at 433 F.2d 24. The memorandum of decision of the United States District Court for the Northern District of California (A. 186-199) has not been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on September 16, 1970. On October 6, 1970, the Court of Appeals signed an order staying issuance of its mandate pending filing, consideration and disposition of the petition for certiorari, provided that the petition be filed on or before November 6, 1970. The petition was filed on November 5, 1970, and was granted on February 22, 1971. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The provisions of law involved are:

Article IV, Section 3, Clause 2, Constitution of the United States;

Administrative Procedure Act as amended by Pub. Law 89-554, 80 Stat. 381 et seq., 5 U.S.C. §§ 551(5), 553, 701-706;

Conservation Code, 16 U.S.C. §§1, 5, 8, 41, 45c, 79, 497, 528-531, 551 and 688, codifying 39 Stat. 535, 48 Stat. 389; 36 Stat. 1253, 66 Stat. 95; 43 Stat. 90; 26 Stat. 478; 44 Stat. 820; 54 Stat. 43; 70 Stat. 708; 74 Stat. 215; 30 Stat. 35, 76 Stat. 1157, 78 Stat. 745; 62 Stat. 861;

Highway Code, as amended by Pub. Law 90-495, 82 Stat. 823, 23 U.S.C. §138;

Territories and Insular Possessions Code, 48 U.S.C. §341, codifying 62 Stat. 100;

Transportation Code, as amended by Pub. Law 90-495, 82 Stat. 824, 49 U.S.C. §1653(f);

United States Forest Service Manual, §§2711.2-1 (now §2711.1-3), 2711.2-5 (October 1968 Amendment No. 12; now 2711.1-4), 2716.3;

Federal Register, 34 Fed. Reg. 19 (Rules for Roadbuilding in National Parks, F. R. Doc. 69-1177, January 28, 1969), 34 Fed. Reg. 6985 (Revocation of Procedures for Roadbuilding in National Parks, April 26, 1969);

These provisions are set out in the Brief Appendix (B.A.).

QUESTIONS PRESENTED

1. Does the Sierra Club, a conservation organization with a special interest in the Sierra Nevada Mountains, have standing to sue to prevent federal officials from illegally authorizing acts which would produce serious and permanent damage in Sequoia National Park and Sequoia National Game Refuge, both located in the Sierra Nevada Mountains?

2. Must a conservation organization show threatened damage to its tangible interests and not merely damage to the aesthetic, recreational or conservational interests of its members and others in order to have standing?

3. Where irreparable harm is inevitable if a preliminary injunction is not granted, must the plaintiff prove a "reasonable certainty" of prevailing, or is it enough to raise serious and substantial questions going to the merits?

4. May the Secretary of Agriculture circumvent Congress' 80 acre limitation on long-term permits for recreational use of national forest land by coupling a permit for 80 acres with a second permit for facilities occupying additional acreage, where the supplementary permit is revocable neither in fact nor in law?

5. May the Secretary of the Interior authorize others to construct a major connecting-link highway across Sequoia National Park for a non-park purpose?

6. May the Secretary of the Interior lawfully disregard his own rule requiring him to conduct public hearings on proposed park roads?

7. May a statute requiring Congressional approval of any transmission line located in Sequoia National Park be ignored by the Secretary of the Interior?

8. May the Secretary of Agriculture authorize a huge private resort development in a Congressionally-established Game Refuge when that use contravenes the express purposes of the Refuge?

STATEMENT

The Sierra Club is a nonprofit corporation with a growing national membership. It had approximately 78,000 members when the complaint in this matter was filed on June 5, 1969, of whom approximately 27,000 lived in the San Francisco Bay Area (A. 4). One of the Sierra Club's principal purposes is the conservation and protection of the natural resources of the Sierra Nevada Mountains *(Ibid)*.

"Environmental Quality", the first Annual Report of the Council on Environmental Quality transmitted to the Congress in August, 1970 by President Nixon, lists the Sierra Club prominently among organizations which ". . . exist to inform, guide, or represent their members in a wide variety of environmental and conservation matters." (*Id.* at 215.)

The Second Circuit has described the Sierra Club as a "national conservation organization with substantial membership . . . and a history of involvement in the preservation of national scenic and recreational resources." See *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97, 103 (1970).

The Sierra Club was aware of the possibility of Forest Service plans for the development of Mineral King in the 1940's (A. 41-45). Consultation between the Sierra Club and the Forest Service about the future of Mineral King took place at intervals over the years (A. 47). The Club became alarmed in 1965 when, for the first time, the Secretaries of Agriculture and Interior and their aides began to consider seriously a massive development along the lines ultimately proposed by Walt Disney Productions, Inc. ("Disney") (A. 26-27, 41-45). It was obvious that a development of that magnitude would have a catastrophic impact on an area which Disney's literature has justly described as a "High Sierra wonderland" which is "unsurpassed in natural splendor" (A. 53a).

In June of 1965, Dr. William E. Siri of the Sierra Club wrote to the Forest Service outlining action taken by the Sierra Club's Board of Directors on May 1-2, 1965. On July 1, 1965, the Forest Service replied denying his re-

quest for a hearing on the Mineral King project (A. 47-48).

In 1965, the Sierra Club also appointed J. Michael McCloskey, a member of its staff familiar with Mineral King and the development proposal, to act as one of its spokesmen. He again requested public hearings on the subject (A. 41-46). The requests were denied (A. 26).

As a necessary adjunct to the proposed Disney development in Mineral King, the State of California proposed to build a new road described as a "freeway" through Sequoia National Park (A. 56, 57). The Kern-Kaweah Chapter of the Sierra Club opposed that project at a hearing held by the State (A. 70).

Subsequently, when it became apparent that hearings would not be held by respondents (the responsible *federal* officials) and that the Disney proposal, together with all of its ramifications (high-voltage transmission lines, freeway, sewage treatment plant, parking structure, etc.) was to be approved, the Sierra Club filed this lawsuit for declaratory relief and to enjoin the Secretaries and their aides from issuing the requisite permits.

The complaint in the case alleges, *inter alia*, the Sierra Club's interest in the preservation of the Sierra Nevada Mountains, the destruction of aesthetic and conservational values which would result from the proposed Mineral King project, and the illegality of the Secretaries' proposed action in approving it (A. 3-11).

The jurisdiction of the District Court was invoked under Section 10 of the Administrative Procedure Act, 5 U.S.C. §§701-706, the Federal Question Statute, 28

U.S.C. §1331(a), the 1962 Mandamus Act, 28 U.S.C. §1361 and the Declaratory Judgment Act, 28 U.S.C. §2201 (A. 3). Jurisdiction of the Ninth Circuit was based upon 28 U.S.C. §1292(a)(1) (A. 209).

There is no suggestion in the record that the Club did not fully exhaust its administrative remedies prior to filing the suit; or that the controversy was not "ripe"; or that the Sierra Club will not vigorously and adequately present its position that the Secretaries are acting in excess of their statutory powers.

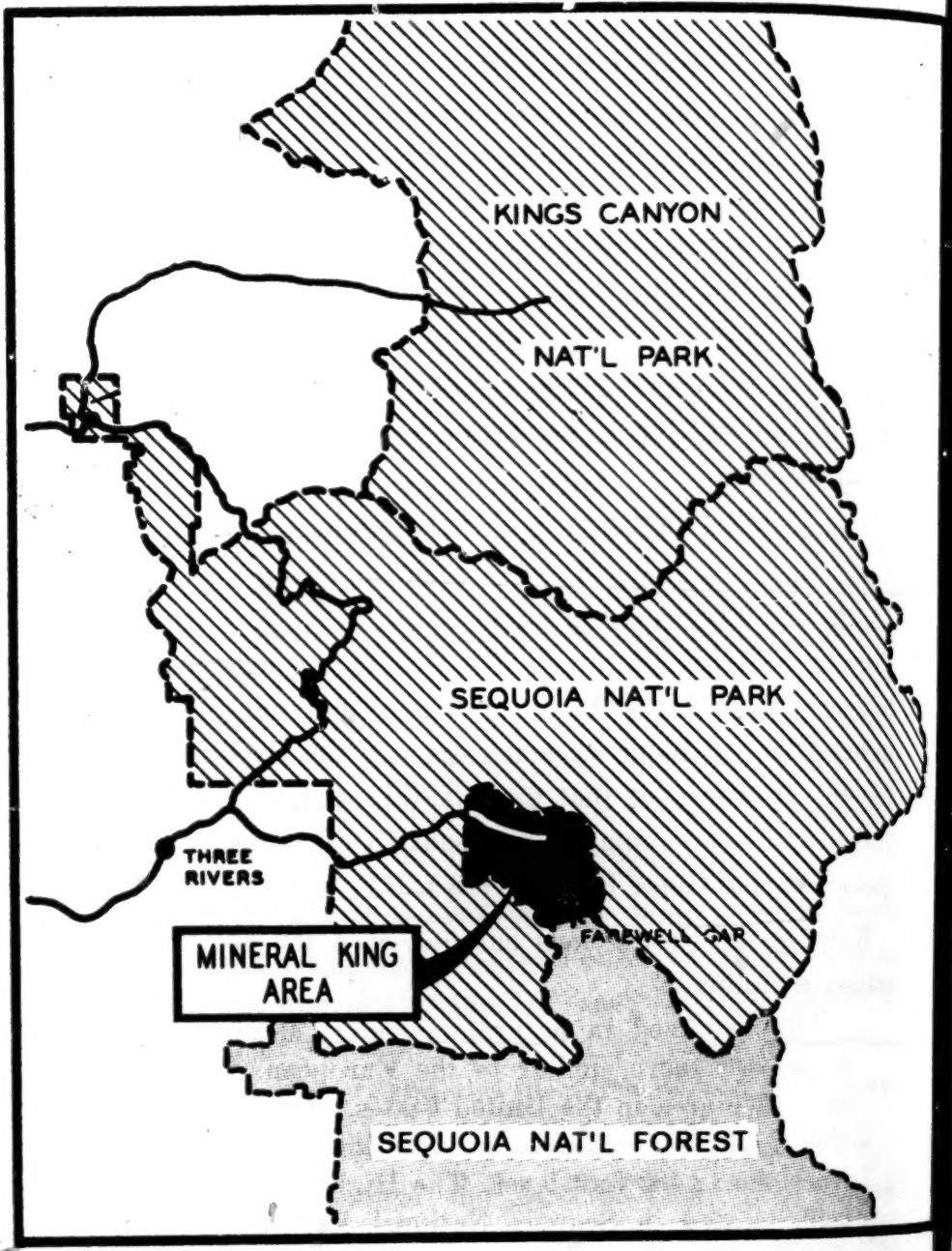
To understand the special legislation which controls the use of Mineral King, one must understand something about the area.

Mineral King Valley is in a U-shaped basin rimmed by 12,000 ft. peaks rising 3,000 to 4,000 ft. above the valley (A. 32, 42). Geographically and ecologically, it is part of Sequoia National Park (A. 26). Due to the existence of mining claims in the Valley, Congress did not formally include Mineral King when it expanded the Park in 1926 (A. 42). However, at that time, it did designate the Mineral King enclave, comprising about 15,000 acres, as "Sequoia National Game Refuge" (16 U.S.C. §688; A. 26, 42).

Walt Disney Productions has described the geographic setting as follows:

> "Unsurpassed in natural splendor, Mineral King is perhaps more similar to the European Alps than any other area in the United States. Altitudes range from 7,800-foot valley to surrounding mountains that reach the 12,400 foot level. The High Sierra wonderland, located in Sequoia National Forest, is generously endowed with lakes, streams, cascades, caverns and matchless mountain vistas" (A. 53a).

The accompanying drawing was prepared from the record to help place Mineral King geographically.



In February, 1965, the Forest Service of the United States, Department of Agriculture, with administrative responsibility for the National Forests, issued a prospectus for a proposed winter and summer recreational development at Mineral King. Minimum facilities contemplated by this prospectus were relatively modest. The prospectus solicited bids from private developers for the construction and operation of a year-round recreation resort (A. 26-27).

In December 1965, without hearings, the Forest Service selected from the six bids received the proposal of Disney for a much more massive resort, designed principally as a ski resort but for summer use as well (A. 27). In January 1966, the supervisor of the Sequoia National Forest granted Disney a three-year preliminary permit (A. 27, 49-52). The permit authorized surveys and plans. It also provided that a thirty-year term special use permit covering not to exceed 80 acres and a supplemental "annual" or "revocable" special use permit for the development and operation of Mineral King would be issued, prior to the expiration of the preliminary permit, if certain conditions were met. The conditions were that the plans as submitted had been approved, that a contract had been awarded for a significant part of the necessary all-season road, and that funds had been programmed for completion of the road within a specified time (A. 27, 51).

While the prospectus had solicited a private expenditure of some $3 million Disney planned to spend $35.3 million to develop Mineral King. While the solicitation was for a facility including four ski lifts and resort accommodations for 100 skiers, Disney's proposal includes

a village incorporating major hotels and lodges for over 3,310 overnight guests, 10 restaurants, a chapel, theatre, general store, five story parking facility, hospital and sewage treatment facilities (A. 27, 53a-c). Other facilities would include power plants, and associated installations, swimming and ice skating facilities, 20 ski lifts, a cog-assisted railroad, avalanche dams and stream control features, and a development scheme which would require "extensive bulldozing and blasting in most lower areas and extensive rock removal at high elevations" and the "grooming and manicuring" of most ski slopes (A. 32, 53a-c).

The record before the District Court showed that Disney could *not* locate all major and indispensable components of the development within the 80 acres covered by the term permit. While neither the Forest Service nor Disney has been willing to reveal any details, the record established, the District Court found and the Ninth Circuit accepted, that major facilities, including ski lifts, towers, sewage treatment facilities and parking structures were to be located on land covered by the supplemental permit (A. 15, 23, 31, 188, 229). This does not include the bulldozed and blasted ski slopes which also would be outside the acreage limitation.

The projected daily use of Mineral King by as many as 14,000 persons (A. 143) would produce nearly twice the concentration of persons found in Yosemite Valley on busy days (A. 28).

Mineral King presently is reached by a low-standard road from Hammond, California constructed to support the mining activities of the 1870s. In the course of its

twenty-six mile route from the west, it traverses a portion of the later-established Sequoia National Park (16 U.S.C. §41). Agriculture's plan assumes a new highway which would open the way to larger numbers of Disney's paying customers (A. 28, 58, 60, 65).

The proposed plan for a freeway across Sequoia National Park calls for two lanes with frequent passing lanes (A. 61). However, the record shows that there is reason to believe that this capacity will prove inadequate. Then Secretary of the Interior Udall said in a letter to then Secretary of Agriculture Freeman in 1968:

> "In addition to our desire to minimize the damage to park values by this road, we are concerned about what we have been told concerning the size of the planned Disney development. Will one two-lane road of park standards be adequate, or will Interior later receive a request for another road?" (A. 136).

Interior Consultant John Clarkeson said:

> "Unless some control or other means is considered, this two-lane road does not look at all adequate for a 14,000-a-day visitor load where so many will be one-day visitors." (A. 157).

Even in its two-lane configuration, the freeway in the mountainous area would include "extensive cutting and filling . . . accompanied by extreme back slopes and embankment slopes to accomplish a stable earthwork condition. . . . [E]mbankments as much as 600 feet and 700 feet wide at the bottom of the prism are required to hold up a mere 28 feet for highway width." (A. 150, 151). The fragile nature of the area through which the highway would pass guarantees that the scars produced would be very slow to heal (A. 90, 142).

As of October 24, 1967, the State of California had committed $22 million for the construction of the freeway which would dead-end at Mineral King (A. 29). The Secretary of the Interior originally opposed the section of the freeway which would cut across Sequoia National Park and urged that a better alternative be found (A. 65-67). He later acquiesced in its location within the Park only reluctantly (A. 139).

On January 27, 1969, the Secretary of Agriculture, through his Forest Service aides, approved Disney's plan and stated that a thirty-year term permit for 80 acres of game refuge and an accompanying permit for the additional acreage would issue automatically upon execution by the State of California of the first contract for construction of a significant portion of the freeway (A. 28). Soon after, without public hearings, Interior threatened to issue the freeway permit to the State (A. 29). That would have set the entire project in motion (A. 28). A high-voltage power transmission line across the Park (without Congressional approval) was also contemplated (A. 40). At this stage, the Sierra Club sought a preliminary injunction.

District Judge William T. Sweigert probed these matters in the course of two days of hearings and found that the Club had raised serious and substantial questions concerning the statutory authority of the defendants to permit the threatened massive alterations of Sequoia National Park and Sequoia National Game Refuge (A. 199). He found that there was an imminent threat of irreparable harm and that preservation of the *status quo* required issuance of a preliminary injunction (A. 198).

The Court of Appeals disagreed. It held that the Sierra Club lacked standing to prosecute this lawsuit. It also held that the Secretaries had acted properly and that the Sierra Club had shown no threat of irreparable injury to itself or anyone else arising from the Secretaries' proposed action (A. 208-235).

SUMMARY OF ARGUMENT

A. Introduction.

The Secretaries of Agriculture and of the Interior threatened to authorize a massive recreational development, a freeway and a high-voltage power transmission line in Sequoia National Park and Sequoia National Game Refuge. The Sierra Club sought and obtained a preliminary injunction barring construction on the ground that the project was illegal in a number of particulars. The Ninth Circuit erred in reversing.

B. Standing.

The Sierra Club is one of the oldest, largest, and most respected conservation organizations in America. Its conservational interests and efforts have been focused upon the Sierra Nevada Mountains, including Sequoia National Park and Sequoia National Game Refuge. Although the Ninth Circuit has purported to give consideration to "conservational, recreational or aesthetic interests" as a basis for standing, it has denied the Sierra Club standing here. It has, in fact, erroneously insisted upon a showing of tangible injury as a prerequisite to standing.

Although the Ninth Circuit did not in terms deny that a membership organization could have standing, that denial is confirmed in its subsequent decision in *Alameda Conservation Association v. State of California,* No. 22961, ... F.2d ..... (9th Cir. Jan. 19, 1971). Its position conflicts with decisions of this Court and better considered decisions of other circuits.

Construing the Administrative Procedure Act, and its application to this case, the Ninth Circuit has taken a narrow, negative view, in conflict with the decisions of this Court, especially *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-141 (1967).

In conservation cases, the choice which the reviewing court makes on the issue of standing very often determines whether or not unlawful administrative action will be tested or will remain untested for lack of a party competent to seek judicial review. This is the role of the "private Attorney General."

On this record, Judge Sweigert was right in finding that the Sierra Club had standing to seek judicial review.

C. Preliminary Injunction Standard.

The huge Disney project in Sequoia National Game Refuge and the related freeway across Sequoia National Park would have caused massive, irreversible ecological damage—i.e. irreparable injury—unless enjoined *pendente lite.* This meant that the District Court was required to find only that the Club had raised "serious, substantial, difficult and doubtful" questions (*Hamilton Watch Co. v. Benrus Watch Co.,* 206 F.2d 738, 740 (2d Cir. 1953)) rather than a "reasonable certainty" of success on the

merits. The Ninth Circuit erroneously applied the "reasonable certainty" test.

D. Merits.

The administrative decisions here in issue must be given thorough, probing, in-depth judicial review. *Citizens to Preserve Overton Park v. Volpe,* 39 U.S.L. Week 4287, 4291 (U.S. March 2, 1971). Judge Sweigert did that. The Ninth Circuit did not. It erred in its easy acquiescence in administrative decisions which were not only an abuse of discretion but beyond the outer limits of any delegation of power by Congress.

1. National Forest Acreage Limit.

Congress, in 16 U.S.C. §497, declared that long-term recreational developments on national forest land must be limited to 80 acres. The Secretary of Agriculture may not circumvent that limitation when some of the indispensable permanent facilities of a proposed huge private recreational development on such land will not fit within 80 acres, by permitting them to spill over onto additional land covered by a second "supplementary" permit. The Secretary's power to make rules and regulations for the national forests is no authority for the second permit because it supports only permits truly revocable at will.

Combinations of permits employed for other recreational developments do not justify the tactic employed here. Existing permits disclose a spectrum of practice ranging from complete respect for the 80 acre limit to complete disrespect. Congress has not ratified the disrespect.

2. Game Refuge.

Congress omitted Mineral King from Sequoia National Park only because of minor prospecting activity. It did designate the area as the Sequoia National Game Refuge in order ". . . to protect from trespass the public lands of the United States and the game animals which may be thereon . . ." 16 U.S.C. §688. Congress authorized only those uses consistent with these purposes.

Agriculture could not find that Disney's massive resort complex is a consistent use without being arbitrary, capricious and abusing its discretion.

3. Park Highway.

Interior is powerless to approve a State of California freeway across Sequoia National Park designed to serve as a connecting link between Mineral King and the State highway system. The Secretary's authority to alter national parks is limited to those changes which serve a park purpose. 16 U.S.C. §1.

The park route to Mineral King is also illegal because it was selected not as the only possible route but as the shortest and cheapest alternative.

An old road in existence before the area it traverses was incorporated into the Park does not render any new highway crossing the Park "legal" simply because the two would have termini in common.

4. Highway Hearings.

The Secretary of the Interior failed to revoke his own regulation requiring public hearings in the case of roads with "substantial social, economic or environmen-

tal effect". Therefore, the threatened freeway across the Sequoia National Park also is illegal because the Secretary failed to conduct a hearing before deciding to issue a permit for the highway.

5. Transmission Line Across the Park.

The Secretary of the Interior could not lawfully approve a high-voltage transmission line across Sequoia National Park because 16 U.S.C. §45(c) requires the approval of transmission lines in that Park by Congress. Since the line was intended to serve Disney's Mineral King development outside the Park, rather than a park purpose, the Secretary also was barred by the generally applicable provisions of 16 U.S.C. §1.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION ON STANDING WAS ERRONEOUS AND MUST BE REVERSED

The Ninth Circuit reversed this case at the threshold, on the ground that the Sierra Club lacks standing to sue. That holding would dispose of the case in its entirety. It is, however, wrong, and must be reversed.

A. The Facts Show the Sierra Club's Interest In the Matters At Issue in this Case.

As pleaded, as noted by the District Court, and as fully supported by the record herein:

> "For many years the Sierra Club by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of per-

> sons similarly interested. One of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants. . . ."
>
> (Complaint, para. 3, referred to in Judge Sweigert's opinion, A. 4, 197.)

The Sierra Club's complaint goes on to allege the threat to conservational, recreational and aesthetic values in the Mineral King Valley posed by respondents' unlawful plans for Sequoia National Game Refuge (Mineral King) and Sequoia National Park.

The affidavits and exhibits comprising the record in this case show in detail the nature of the planned development and the grounds for the Sierra Club's objections. Those matters are discussed, *infra,* in the portion of this brief dealing with the merits of the controversy. For the purpose of this discussion of standing, they need not be set forth in detail in this section. It is sufficient that the Sierra Club has alleged its interest in the preservation of conservational, recreational and aesthetic values of Mineral King and Sequoia Park and that it has alleged that construction plans approved by the Secretaries of Agriculture and Interior threaten those interests.

The Ninth Circuit held that the Sierra Club lacked sufficient interest to challenge the Secretaries' unlawful activities. As we shall demonstrate, the Ninth Circuit was wrong on a number of grounds.

B. Standing for Conservation Organizations is Critically Important to America.

The standing issue has particular significance for cases involving the environment. Whether the issue is one of public health (such as air, water, or noise pollution), or of conservation (such as the preservation of parks, game refuges, wilderness areas and other sanctuaries of natural beauty) the standing issue is the same. In each instance, administrative action has wide-ranging effects important to the whole society. In each instance, also, well-financed, well-organized private interests are arrayed against broader but less specific interests of the defenseless and unorganized population at large. In these circumstances, it is unlikely that lawless administrative action will be judicially reviewed and corrected unless at the behest of some organization acting as "private Attorney General."

If our nation is to function in the manner contemplated by its Constitution, the mandate of the legislative branch must be followed by the executive branch and the judicial branch must oversee its proper execution. The federal judiciary should not abdicate its responsibility by denying standing to the only private plaintiffs likely to frame and present the issues to the Court.

While the law of standing has advanced fast and far along a broad front, this development is particularly significant to what has been termed "the quality of our lives." See: *Environmental Defense Fund, Inc. v. Hardin,* 428 F.2d 1093 (D.C. Cir. 1970); *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir. 1970); *United Church of Christ v. FCC,* 359 F.2d 994 (D.C. 1966); *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2d Cir. 1965). Cf. *Alameda Conservation*

Association v. State of California, ... F.2d ..... (9th Cir., Jan. 19, 1971), No. 22961. See also remarks of Robert W. Ginnane, General Counsel, ICC, published in 20 ABA Admin. L. Rev. 149 (1969).

C. The Ninth Circuit has Misconstrued "Aggrievement" as it Relates to Standing.

The Ninth Circuit's opinion says that standing may be grounded upon "aesthetic, conservational and recreational" interests. It further states that the proposed Mineral King development and the related road and power transmission line are "personally displeasing or distasteful" to the Sierra Club and its members. Then, in a masterpiece of irreconcilable inconsistency, it concludes that the Sierra Club is not aggrieved or adversely affected "within the meaning of the rules of standing." It cites Black's Law Dictionary for a definition of "aggrieved" (A. 223).

The Ninth Circuit should have consulted a dictionary for the meaning of the word "aesthetic" and might better have consulted the many cases on the subject (rather than Black's Law Dictionary) for a definition of the word "aggrieved."

As far as aesthetics are concerned, the enormous impact of this huge project upon the "matchless mountain vistas" of the Mineral King area is obvious from the record. Disney may think that freeways, power lines, "manicuring and grooming" of ski slopes, towers, lifts, debris dams, and well over 80 acres of hotels, restaurants, parking structures and sewage treatment plants will make Mineral King more beautiful than ever. The Sierra Club vigorously disagrees. It is interested in preserving the

natural beauty of Mineral King, not in artificial "beauty" superimposed upon Mineral King by the hand of man.

Leaving aesthetics aside, the proposed Mineral King project and the freeway across Sequoia Park will undeniably have potentially serious adverse effects upon the park landscape. Even the limited record made in this case on the issue of a preliminary injunction is replete with evidence of the fragility of this high mountain valley, and the predictable erosion and scarring which the project will cause (A. 28-158 passim).

As far as the issue of standing is concerned, the question is not whether the Sierra Club's views on conservation and aesthetics are correct. The question is whether the Club as a litigant will vigorously assert interests adverse to the Secretaries, whose actions are being challenged. See *Barlow v. Collins,* 397 U.S. 159, 164 (1970); *Association of Data Processing Organizations v. Camp,* 397 U.S. 150, 151-152 (1970); *Flast v. Cohen,* 392 U.S. 83, 99 (1968).

But, notwithstanding its ritual recital of the "aesthetic, conservational or recreational" language from *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970), the Ninth Circuit has trouble believing that one can be "adversely affected or aggrieved" absent some essentially economic interest. The Ninth Circuit highlights the economic interest of successful plaintiffs in many of the recent cases on standing (A. 218-221).

It also suggests that the Sierra Club would have standing if it had a cabin in the Mineral King valley which would be razed to make room for the Disney project (A. 219). It rejects, however, the idea that the Sierra

Club might have standing as a "private Attorney General" to assert aesthetic, conservational or recreational interests of its members (A. 224, f.n. 9).

The conflict between the Ninth Circuit's decision in this case and the Second Circuit's decision in *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97, 102 (1970) is, of course, clear. The Second Circuit has recognized the Sierra Club's legally protectable interest in the aesthetic, conservational and recreational aspects of the Hudson River Valley; the Ninth Circuit has refused to recognize the Sierra Club's conceptually indistinguishable interest in a Game Refuge and contiguous national park in the mountains from which the Sierra Club takes its name.

As the Second Circuit correctly pointed out in *Citizens Committee v. Volpe,* supra, "aggrieved" means the same thing whether the complainant is complaining about the actions of agencies such as the Federal Power Commission and Federal Communications Commission (governed by statutes with self-contained judicial review provisions),[1] or the actions of agencies governed solely by the judicial review provisions of the APA.

The Second Circuit reaches that conclusion by the simplest and most direct route:

> "We hold, therefore, that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as re-

[1] Cf. *United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1966); *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2d Cir. 1965)

sponsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest." (425 F.2d at 105).

The vice of the Ninth Circuit's contrary rule is seen most clearly when it is applied to a wilderness area threatened by unauthorized commercial exploitation. In such a case, who will have standing to complain if not some conservation organization? By definition, in a wilderness there are no cabin owners and no local residents to protest if the responsible officials bow to sharply focused economic pressures and betray their trust to future generations. And yet, under the Ninth Circuit's rule, no one would have standing to protest.

Clearly, the Second Circuit's rule is correct and the Ninth Circuit's rule in error.

D. The Administrative Procedure Act Provides the "Statutory Aid" to Standing, If Any Is Required.

The Ninth Circuit erred when it attempted to distinguish *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2d Cir. 1965) cert. denied 384 U.S. 941 (1966), on the ground that "Section 313(b) of the [Federal Power] Act specifically grants to a party aggrieved by an order of the Commission the right of review by the United States courts of appeals. There is no such statute involved in the present case to give standing" (A. 218)

As Professor Davis points out in his recent article "The Liberalized Law of Standing," 37 U. Chi. L. Rev. 450, 465-467 (1970), the Ninth Circuit's approach is wrong. Some earlier cases have suggested that Section

10(a) of the Administrative Procedure Act (5 USC §702 Supp. II, 1967), which affords judicial review to "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" could only come into play when the "adversely affected or aggrieved" language was repeated in some fashion in the specific statute in issue (such as the Federal Power Act in *Scenic Hudson,* supra).

Cases requiring "further assurances" that the APA meant what it said with regard to the particular industry in question, rests upon a misunderstanding of legislative history of the APA.[2] This line of cases came to an end with *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970). In that case, the Eighth Circuit had concluded that "[u]nless a relevant statute provides for a 'party in interest' to seek judicial review or unless a complainant possesses a recognized legal interest, he lacks standing to be a 'private attorney general' to represent the public interest." *Association of Data Processing Service Organizations, Inc. v. Camp,* 406 F.2d 837, 843 (8th Cir. 1969). This Court reversed, stating:

> "The 'legal interest' test goes to the merits. The question of standing is different. It concerns, apart from the 'case' or 'controversy' test the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (397 U.S. at 153).

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[2] *Scanwell Laboratories, Inc. v. Shaffer,* 424 F.2d 859 (D.C. Cir. 1970); Davis, *The Liberalized Law of Standing, supra.*

Similarly, in *Barlow v. Collins,* 397 U.S. 159 (1970), involving the Food and Agriculture Act of 1965, there was no provision of that Act which gave petitioners standing to challenge the administrative regulation at issue. The Fifth Circuit had denied standing, *Barlow v. Collins,* 398 F.2d 398 (5th Cir. 1968), stating that "a policy of protecting a class of persons does not, without more, grant a legal right to those persons to enforce the policy." (398 F.2d at 401.) In reversing, this Court said "the legislative history of the 'making a crop' provision, though sparse, similarly indicates a congressional intent to benefit the tenants. They are persons 'aggrieved by agency action within the meaning of the relevant statute' as those words are used in 5 U.S.C. §702 (1964 Ed., Supp. IV)." (397 U.S. at 164-165.)

The First Circuit decision in *Arnold Tours, Inc. v. Camp,* 408 F.2d 1147 (1st Cir., 1969), also took the restrictive view of the APA, but was reversed here, on the basis of *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150. See *Arnold Tours, Inc. v. Camp,* ..... U.S. ....., 27 L.Ed.2d 179 (1970).

In *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir. 1970), the Second Circuit correctly interpreted these cases to extend standing to the Sierra Club although the Rivers and Harbors Act, under which the case arose, contained no review provisions (425 F.2d at 104).

Notwithstanding these guiding decisions, the Ninth Circuit's majority concluded that, absent some review provisions in the statutes here in issue, the Sierra Club could

not have standing as private Attorney General to defend Mineral King. Obviously, it erred.

E. The Ninth Circuit Erred in Denying the Sierra Club Standing because it is a "Group."

In this case, the Ninth Circuit has attempted to distinguish two prior decisions expressly holding that the Sierra Club has standing to sue: *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir. 1970), and *Parker v. United States,* 307 F.Supp. 685 (D. Colo. 1969). The Ninth Circuit says:

> "In both of these cases, however, the Sierra Club was joined by local conservationist organizations made up of local residents and users of the area affected by the administrative action." (A. 224).

The Ninth Circuit's subsequent decision in *Alameda Conservation Association v. State of California,* ..... F.2d ..... (9th Cir., Jan. 19, 1971), No. 22,966, demonstrates that it was not serious about this distinction. It is now apparent that, under the Ninth Circuit rule, a conservation organization does not have standing *as a representative of the interest of its members* even though it is joined with others as plaintiffs and those others *do* have standing.

In *Alameda Conservation Association* there were three groups of plaintiffs:

1. The Alameda Conservation Association, which was denied standing by a majority of the Court *on the basis of the Ninth Circuit's decision in the case at bar.*

2. The individual plaintiffs owning property abutting the waters of San Francisco Bay, unanimously held to *have* standing to challenge the filling of the Bay; and

3. The individual plaintiffs who lived at some distance from the shore of the Bay, also held to have standing by a majority of the court.

The Ninth Circuit's rule, expressed in this case and in *Alameda Conservation Association, supra,* is contrary to well-considered decisions of circuits which have recognized that a membership organization can, and should be permitted to, represent the collective position of its membership in administrative proceedings dealing with areas within the organization's particular interest.

See, for example, the D. C. Circuit's decision in *Environmental Defense Fund, Inc. v. Hardin,* 428 F.2d 1093 (1970). In that "environmental" case, *all* of the parties seeking review were conservation organizations of one type or another, the Sierra Club among them. They were found to have standing. The Court said, *inter alia:*

> ". . . the consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem.
>
> "On the basis of petitioner's uncontroverted allegations, it appears that they are organizations with a demonstrated interest in protecting the environment from pesticide pollution. Therefore they have the necessary stake in the outcome of a challenge to the Secretary's inaction to contest the issues with the adverseness required by Article III of the Constitution." (428 F.2d at 1097; footnotes omitted).

More recently, in a case involving economic competition, this Court has accorded standing to a membership organization which was the *sole* plaintiff in the case. See *National Association of Securities Dealers v. SEC,* 39

U.S.L. Week 4406 (U.S. April 5, 1971). See also cases cited in *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, *supra*, at notes 14, 15, and 17.

As Professor Jaffe has concluded,

> ". . . there are quite positive virtues in the direct assumption of party responsibility by an association. If the Court will allow a citizen or a taxpayer to sue, standing of a representative association would seem almost *a fortiori*." Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 Harv. L. Rev. 255, 301 (1961).

A practical reason for allowing standing to a group is that it is more likely to represent a balanced viewpoint of a responsible segment of the public interest than is an individual litigant. The fact that there may be several groups with opposing ideas should be no detriment to standing; each group should have the right to contest what it deems to be illegal agency action which affects it adversely, or to support it.

In its *Alameda Conservation Association* case, *supra*, the Ninth Circuit rejects the idea that an organization should have standing to represent the interests of its members. The court there points out that "[a] corporate interest in one or more of its stated purposes and ideals may change depending upon the constituency of its board of directors." (..... F.2d ....., 9th Cir. 1971, No. 22,961, p. 7).

That is, of course, true. But is a conservation group a less reliable representative of the public interest than an individual private litigant? The individual is mortal, which a non-profit corporation is not, and he too may

change his mind, or move away, or just lose interest. On balance, it would seem that a well-established group, and not an individual, would be most likely to pursue a case of general public importance to its final legal conclusion.

If the Ninth Circuit is objecting to the concept of representative actions as such, it is swimming against the tide of the class action concept set forth in Fed. R. Civ. P. Rule 23. It is also bucking the concept which underlies the shareholder's derivative action. It is rejecting the concept of the "test case," without which the great strides made in civil rights in recent years would hardly be imaginable.

On balance, the rule allowing standing to groups to represent their members in public interest cases would seem eminently desirable. Cf. *NAACP v. Button,* 371 U.S. 415 (1963).

F. The Sierra Club is Within the Zone of Interests Protected by the Conservation Code.

With or without the benefit of an express statute providing for judicial review, a person "arguably within the zone of interests protected by a statute" has standing to seek review of an administrative decision based upon the statute. *Arnold Tours, Inc. v. Camp,* ..... U.S. ....., 27 L.Ed.2d 179 (1970); *Barlow v. Collins,* 397 U.S. 159 (1970); *Association of Data Processing Service Organizations v. Camp.,* 397 U.S. 150 (1970).

In matters involving conservation, the Sierra Club clearly is within the zone of protected interests. To hold otherwise is to ignore the role that the Sierra Club and its founders have played in the entire conservation move-

ment, not to mention the expansion of Sequoia National Park and the creation of Sequoia National Game Refuge.[3]

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[3]On behalf of Stephen T. Mather, director, National Park Service, H. M. Albright testified before the House Committee on the Public Lands considering HR 5006, a bill to add certain lands to Sequoia National Park, in February, 1920. Referring to certain proposed boundaries set forth in the bill, he said:

> "First, I would like to make a point clear that has not been emphasized, and that is that the National Park Service did not originally outline those purple boundary lines. They were drawn, years before the Park Service was created, by the Sierra Club and with the advice of John Muir, whom we all know to have been one of the greatest naturalists of his time. John Muir traveled over this country from the early days of California up to the time of his death in 1914. At various times he brought up the question of having a park established, and I think that these lines were first drawn about 1911, but were never brought to the attention of Congress until comparatively recently . . ."
>
> "So this line, as I say, was drawn by those people who undoubtedly knew the mountains better than anybody else. The Sierra Club members probably know that area better now than any other living people. They go in there nearly every year, a club of about 2,000 members and they know every nook and corner of it; they know it better than even the Park Service does, and for that reason, even if we could see administrative changes in the proposed line that might be made, we would still feel like adhering to the boundary lines as drawn, because these people have studied so much more thoroughly." Hearing on HR 5006 before the House Comm. on the Public Lands, 66 Cong., 2d Sess., at 68-69 (1920).

See e.g., NASH, WILDERNESS AND THE AMERICAN MIND (Yale Press, 1967) esp. 132-133, 161-181; H. R. JONES, JOHN MUIR AND THE SIERRA CLUB—THE BATTLE FOR YOSEMITE (Sierra Club, San Francisco, 1965) esp. 4-9, 173-174; S. UDALL, THE QUIET CRISIS, (Intro. J. F. Kennedy), (Holt, Rinehart and Winston, 1963), esp. 109-126; J. ISE, OUR NATIONAL PARK POLICY, A CRITICAL HISTORY, (Johns Hopkins Press, 1960), esp. 88-89, 188-189; II W. F. BADE, THE LIFE AND LETTERS OF JOHN MUIR, (Riverside Press, Cambridge, 1924), esp. 255-257, 392-397; E. A. MILLS, YOUR NATIONAL PARKS, (Riverside Press, Cambridge, 1917); esp. 94-95; THE NATIONAL PARKS ASSOCIATION, BULL. 23 (December 14, 1921), Bull. 24 (January 30, 1922), Bull. 34 (July 6, 1923).

If conservationists are not "within the zone of interests protected by" the conservation statutes, it is difficult to imagine who might be. By definition, the conservation statutes do not protect persons with economic interests. Indeed, they protect *against* persons whose economic interests are to exploit the material wealth of public land at the expense of its despoliation. Others may be *affected* by the interpretation given to conservation statutes, but only those like the Sierra Club who would like to see our priceless heritage of natural beauty preserved are within the zone of interests *protected* by the conservation statutes.

G. The Ninth Circuit has misplaced the burden with respect to the standing issue.

The whole tenor of the Ninth Circuit's opinion on standing is that the Sierra Club has a heavy burden of establishing its standing, and that it has failed to sustain that burden. The approach is fundamentally wrong; "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1967). See also *Association of Data Processing Service Organizations v. Camp,* 397 U.S. 150, 157 (1970).

Nowhere does the Ninth Circuit suggest a good reason why the Sierra Club should not pursue its controversy with the Secretaries over their plans for Mineral King in federal court. The contention that defendants also had an "interest" in Mineral King, and, indeed, the contention that they have acted properly with respect to Mineral

King, is simply not responsive to the question of whether or not the Sierra Club has standing to seek judicial review. The rightness or wrongness of the Secretaries' action is a matter of the merits, not of standing.

H. "Standing" should not be used as a means for avoiding judicial responsibility.

The concept of standing offers a continuing judicial temptation to dispose of cases at an early stage without reaching the merits. This temptation should be eliminated. It conduces not only to false judicial economy but to serious avoidance of judicial responsibility.

As Professor Davis points out, floods of litigation have not followed even where statutes and judicial decisions have long afforded standing to practically anybody at all. See Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 471 (1970). And litigation over standing probably engages as much judicial time and effort as would decisions of these controversies on the merits.

Professor Jaffe disagrees somewhat with Professor Davis in approach, but urges judicial discretion to afford standing where a serious administrative wrong would otherwise go unredressed. See Jaffe, *Standing Again*, 84 Harv. L. Rev. 633 (1971).

As Professor Davis points out, there are other doctrines better calculated, where properly applicable, to ". . . accomplish judicial objectives unrelated to the task of deciding whether a particular interest asserted is deserving of judicial protection." Those doctrines include the law of "ripeness," "political question," "case or controversy," "scope of review," or simply "unreview-

ability." Davis, *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 469 (1970).

Where those other objections to judiciability are not present, a "private Attorney General" should not be turned away for "lack of standing." The purpose of courts in society is not merely to dispense justice but to reassure the populace that it is possible to get justice. Rigid rules of standing work counter to this objective. While it is disappointing for a litigant to be told that he is wrong, it is intolerable for him to be told that he will not even be heard.

It would not be amiss to think of the nation's national park and national forest land as property which Congress entrusted to the Secretary of the Interior and the Secretary of Agriculture for the benefit of all Americans, including generations yet unborn. Continuing that analogy, why should not the court have power to appoint the Sierra Club guardian *ad litem* for the beneficiaries of that trust? It may be argued that Judge Sweigert in effect did just that. On this record, it certainly could not have been an abuse of discretion for him to do so.

Where a federal official has in fact acted in excess of his statutory authority, or contrary to it, there is only one effective remedy: A lawsuit. Since Congress has already expressed its will in the statute, and the officer has equally expressed his intention to disregard the will of Congress, the remedy (if there is to be one) must be in the courts.

A narrow interpretation of "standing" means that many types of lawless administrative action will remain beyond the reach of justice. Here, the question is espe-

cially important because, unless defendants' lawlessness can be curbed now, it can never be curbed at all. The proposed changes in topography and vegetation of the Mineral King area, to be achieved with blasting powder, bulldozers and chain saws, will be irreversible and irreparable for all the foreseeable future.

Moreover, the Sierra Club is the only actual (or indeed likely) spokesman for the public interest in the preservation of Mineral King from the effects of illegal action. If the public interest is to have any meaningful representation in a decision which will have lasting and irreversible consequences for the disposition of the public lands, then the Sierra Club, or some comparable organizations, must have an opportunity to be heard.

The issue here is not a choice between the Sierra Club and a more appropriate plaintiff but between the Sierra Club and nobody. Cf. *Alderman v. United States,* 394 U.S. 165 (1969).

II. THE NINTH CIRCUIT APPLIED AN IMPROPER STANDARD FOR PRELIMINARY INJUNCTION

A. Irreparable Harm Was Imminent.

The preliminary injunction granted by Judge Sweigert was necessary to prevent imminent harm to the public interest represented by the Sierra Club. The District Court had before it the immediate threat of the Secretary of the Interior to issue a permit to the State of California for construction of an illegal highway across Sequoia National Park (A. 29). At that point, the State would have been free to let construction contracts immediately (A. 28).

When Judge Sweigert acted, plans for Disney's private resort had been approved by the Forest Service. Issuance of the interlocking permits awaited only the award by the State of a contract for construction of a significant portion of the road (A. 28). The award of that contract would have perfected Disney's right to commence work on the entire project at Mineral King.

Judge Sweigert received evidence of the irreparable effects of the plans which the grant of permits would have set in motion. That evidence included internal memoranda of the Forest Service. One stated:

> "The total basic concept of development appears badly biased in orientation toward a highly artificial, continued situation, without any real attention to ecological factors and needs to multiple use management. The extent and nature of proposed alteration of the basin is unacceptable to us—the damages extend beyond effects on fish and wildlife, and these alone are critical." (A. 131).

A second memorandum, this from the chief of the Forest Service Division of Recreation, observed:

> "Engineering may not have been aware that in accepting the Disney proposal, we agreed to the concept of a village with underground automotive service facilities for deliveries, maintenance, etc. *This brings with it a need for land modification, earth moving, and possibly stream channel changing beyond what we might normally permit.* The underground roadways and chambers must either be tunneled or built partially on the surface, boxed in and backfilled. The report favors the latter, *which means a great deal of earth and debris moving.*"

> ". . . The impact is certain to be heaviest at the village site and on the valley floor. By accepting the development proposal we have also accepted that some effect on fishing values, streamflow, vegetation, soil, and other resources must be provided for." (Emphasis added.) (A. 128-129).

The evidence also included a study by Dr. Richard J. Hartesveldt concerning the effects of the new highway upon the ecology of sequoia groves within the Park:

> ". . . there are a total of 103 giant sequoias below the proposed highway. Of these, 45 are in a position of possible jeopardy because of road construction." (A. 123).

As stated in a Forest Service memorandum from "Range and Wildlife Management" to "Recreation," Mineral King is a "fragile, sub-alpine area." (A. 131).

The proposed project would have had major, permanent and devastating effects if permitted to proceed (A. 127, 131, 142). If the District Court had permitted the project to proceed, later proof that it was illegal would have been an exercise in futility.

B. The Injunction Did Not Threaten Irreparable Harm to Opposed Parties.

If the project had been allowed to proceed, it would have caused irreversible adverse effects. Delay, on the other hand, could not produce irreparable harm. The Secretaries did not, as they could not, argue otherwise. They did complain that if an injunction barred surveys, studies and planning, it would delay the project and result in the loss of permit fees (A. 169).

Responding to this concern, Judge Sweigert tailored his order so that only actual construction or physical disturbance of the terrain was enjoined. That order was not to "be deemed to preclude the conduct of investigations, planning, surveys and exploration in connection with the design of said development [and highway]. . . ." (A. 201).

In its *amicus* brief in opposition to the petition for certiorari, Tulare County argued that its economic development is threatened by delay in completion of the Disney development (T.C.B. 10). Whether the project would constitute a net long-term gain for Tulare County is problematical.

Even if this contention were correct, it was presented for the first time as argument in the Ninth Circuit. There is neither evidence nor support for it in the record.

More important, it does not amount to irreparable harm. The potential adverse effects claimed by Tulare are at most an unfortunate by-product of the loss of a private investment—economic disappointment which any area suffers when a private investment, once a possibility, fails to materialize.

Neither did the preliminary injunction threaten irreparable harm to skiing interests. The Sierra Club has made clear that it does not seek to cast doubt on the legality of existing resorts (R.M. 9) of which there are already a large number.

C. The Ninth Circuit Erred In Applying the "Reasonable Certainty" Test.

Judge Sweigert found "that plaintiff has raised questions . . . sufficiently substantial and serious to justify a preliminary injunction" and that it made "a sufficient showing of imminent and irreparable injury to require pendente lite relief." (A. 198, 199).

The Ninth Circuit decided that Judge Sweigert applied the wrong test and thereby abused his discretion. It said that the Sierra Club was required to show both a "reasonable certainty" that it would prevail on these questions *and* that it would suffer irreparable injury in order to justify a preliminary injunction (A. 225). This was error.

The proper test, which was applied by Judge Sweigert, is set forth in the leading case of *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953). In that case, Judge Frank said:

> "To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." 206 F.2d at 740.[4]

To require any stronger showing would be to involve the Court in a premature judgment of the merits of the

[4]The standard applied in *Hamilton Watch, supra,* has been employed uniformly. See, as examples, *Semmes Motors, Inc. v. Ford Motor Company,* 429 F.2d 1197, 1205-6 (2d Cir. 1970);

case without the benefit of a full hearing. As observed in *Love v. Atchison, T. & S.F. Ry. Co.*, 185 Fed. 321 (8th Cir. 1911):

> "The controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties *before their claims can be investigated and adjudicated.*" 185 F. at 331 (emphasis added)

The hearing for preliminary injunction does not provide for such a full investigation of the merits.[5]

In support of its "reasonable certainty" test, the Ninth Circuit cited *H. E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13 (2d Cir. 1963), *Garlock, Inc. v. United Seal, Inc.*, 404 F.2d 256 (6th Cir. 1968), which echoed *H. E. Fletcher, supra*, and *Hall Signal Co. v. General Ry. Signal Co.*, 153 Fed. 907 (2d Cir. 1907). The Ninth Circuit also characterized the required showing as a "persuasive demonstration". In support, it cited *District 50, United Mine Workers v. International U., U.M.W.*, 412 F.2d 165 (D.C. Cir. 1969) and *Udall v. D.C. Transit System, Inc.*, 404 F.2d 1358 (D.C. Cir. 1968). None of these cases support application of such a test where, as was the situation at bar, clear irreparable harm is threatened.

Tampa Phosphate R. Co. v. Seaboard Coast Line R. Co., 418 F.2d 387, 392 (5th Cir. 1969); *National Lawyers Guild v. Brownell*, 225 F.2d 552, 554 (D.C. Cir. 1955); *Railroad Yardmasters v. Pennsylvania Railroad Co.*, 224 F.2d 226, 229 (3rd Cir. 1955); *Mytinger & Casselberry, Inc. v. Numanna Laboratories Corp.*, 215 F.2d 382, 385 (7th Cir. 1954).

[5]Accord, *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 742 (2d Cir. 1953); JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 695 (1965).

Unicon Management Corp. v. Koppers Co., 366 F.2d 199 (2d Cir. 1966) confirms that the Ninth Circuit misapplied this line of cases. In that case, the Second Circuit states:

> "We reaffirm our holding in H. E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13, 17 (2 Cir. 1963), that the party seeking a preliminary injunction has a 'burden of convincing [the court] "with reasonable certainty" that it "must succeed at final hearing." Hall Signal Co. v. General Ry. Signal Co., 153 F. 907, 908 (2 Cir. 1907)," *where, as there, it appears that a 'lack of adequate showing of irreparable damage' also exists.* But we do not think that what was said in *Fletcher* is a departure from the more generally accepted statement of the rule that 'it will ordinarily be enough that the plaintiff [defendant here] has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation,' where, as here, 'the balance of hardships' tips decidedly toward the party requesting the temporary relief. Hamilton Watch Co. v. Benrus Watch Co., supra, 206 F.2d at 740. The likelihood of success is 'merely one strong factor to be weighed along with the comparative injuries of the parties.' 3 Barron & Holtzoff, Federal Practice & Procedure § 1433, at 493 (1958)." 366 F.2d at 201, 203 (Emphasis added).

Both the *H. E. Fletcher* and *Hall* test and the similar "convincing presentation" test are inapplicable where irreparable harm is imminent. *District 50, United Mine Workers v. International U., U.M.W., supra,* following *Udall v. D.C. Transit System, Inc., supra,* cites the *Unicon* decision with approval and imposes the strict proof

requirement because "the showing of irreparable harm is weak." (412 F.2d at 168). *Udall* was a case similarly devoid of a showing of irreparable harm.

Neither is there any basis for imposing a greater standard because the injunction deals with "the discretionary action of an official of cabinet rank." In *National Lawyers Guild v. Brownell,* 225 F.2d 552 (D. C. Cir. 1955), a suit to enjoin an administrative act of the Attorney General, the court said:

> "A motion for preliminary injunction requires the court to determine whether there are *substantial questions* and whether there would be irreparable injury to one party or the other, and to balance the equities between the parties." (225 F.2d at 554). (Emphasis added).

That standard is a restatement of the *Hamilton Watch* rule. A line of cases deriving from *Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921 (D. C. Cir. 1958), requires a "strong showing that [plaintiff] is likely to prevail on the merits of its appeal" when, having been ruled against in an administrative decision, it seeks to stay or enjoin the administrator from giving effect to the order pending an appeal. The higher standard applies to such cases because the stay is sought after plaintiff has lost on the merits. It then acts as an "intrusion into the ordinary processes of administration and judicial review." (259 F.2d at 925).

Where, by contrast, the plaintiff has had no opportunity to be heard on the merits and seeks an injunction in aid of that opportunity, the standard applied by the trial court is that of *Hamilton Watch,* whether the defendant

is a federal administrator or not. See *United States v. Moore,* 427 F.2d 1020 (10th Cir. 1970); *Baggett Transp. Company v. Hughes Transp., Inc.,* 393 F.2d 710, 716-17 (8th Cir. 1968).

The Secretaries in their brief opposing the grant of certiorari correctly acknowledge that the "reasonable certainty" test is applicable to this case only if there was no threat of irreparable harm. Their argument that the Club was not threatened is based upon the erroneous test of standing applied by the Ninth Circuit.[6] With the Club's standing to represent the public interest confirmed by this Court, the Secretaries will be forced to concede that Judge Sweigert was correct in finding a threat of irreparable harm to that public interest, that he applied the proper test and that the Ninth Circuit erred.

III. THE MERITS

A. Introduction.

The issues which the Sierra Club presented to the District Court were whether:

1. 16 U.S.C. §497 bars long-term use of more than 80 acres of national forest land for recreational purposes.

2. 16 U.S.C. §688 bars a use of the lands of the Sequoia National Game Refuge which would interfere with game animals and their habitat.

3. 16 U.S.C. §1 bars use of a National Park for a non-park purpose.

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[6]See footnote 2 (Def. B. 7-8).

4. The Secretary of the Interior's Rule for Road Building in National Parks, 34 Fed.Reg. 19, bars approval by the Secretary of a highway across Sequoia National Park absent the required public hearings.

5. 16 U.S.C. §45(c) bars construction of a transmission line in Sequoia National Park without Congressional authorization.

At the threshold, these issues are not contests of administrative discretion. The threatened acts were clearly outside the scope of administrative authority. They did not involve problems of statutory construction calling for agency expertise and judicial deference. Rather, they were attempts to act outside unambiguous limits set by Congress.

> "'Where the only or principal dispute relates to the meaning of the statutory term' . . . [the controversy] presents issues on which courts, and not [administrators], are relatively more expert." (citing authority) *Barlow v. Collins,* 397 U.S. 159, 166 (1970).
>
> "Judicial relief is available to one who has been injured by an act of a governmental official which is in excess of his express or implied powers." *Harmon v. Brucker,* 355 U.S. 579, 581-582 (1958).

Nor does the fact that the challenged administrative decisions involve the public lands immunize them from judicial review. See e.g. *United States v. Coleman,* 390 U.S. 599 (1968); *State of Washington v. Udall,* 417 F.2d 1310 (9th Cir. 1969).

This Court has observed recently that, even where *de novo* review is not available, the scope of judicial review of administrative acts is substantial. *Citizens to Preserve*

Overton Park v. Volpe, 39 U.S.L. Week 4287, 4291 (U.S. March 2, 1971). The presumption of regularity of administrative decisions "is not to shield [the Secretaries'] action from a thorough, probing, in-depth review" *(Ibid.).*

The reviewing court must decide: 1. Whether the Secretary's threatened acts were outside any statutory authority (by defining the scope of that authority) and, 2. Whether actions within the scope of that authority were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Overton Park* case, *supra* (39 U.S.L. Week 4287, at 4291; 5 U.S.C. §706(2)(A) (Supp. V)).

Judicial review also requires the court to decide "whether the Secretary's action followed the necessary procedural requirements." (39 U.S.L. Week 4287 at 4292).

The Ninth Circuit failed to decide these questions.

Concerning the 80 acre limitation, if other requirements of law are met, the Sierra Club could not quarrel with any reasonable decision of the Secretary to grant a permit for a ski resort at Mineral King with a total acreage requirement of less than 80 acres. Neither could it second-guess any reasonable configuration of improvements on that acreage. Nor could it complain of his refusal to grant any permit at all. All of those matters are within his administrative discretion. However, "administrative discretion" does not shield the Secretary when he ignores 16 U.S.C. §497 and exceeds his 80 acre authority, for that is a limit established by Congress.

The Sierra Club could not challenge a construction project in a national park intended to serve a park pur-

pose unless the decision to permit the construction was without rational basis or followed a procedural error. This would be so even if the Club disagreed violently with the benefit-detriment analysis of the Secretary of the Interior. But the Secretary's broad management prerogative is not relevant when he ignores 16 U.S.C. §1 and authorizes highly damaging construction in a national park to serve a non-park purpose.

The Club could not challenge the Secretary's decision to authorize construction of a low voltage electrical *distribution* line in Sequoia National Park for a valid park purpose though it disagreed with his decisions concerning its location or the necessity for it. But the Secretary may not disregard 16 U.S.C. §1 and 16 U.S.C. §45(c) by authorizing construction of a *transmission* line to serve a purpose foreign to the Park and without Congressional approval.

The Sierra Club challenges the Disney project in Sequoia National Game Refuge because there is no evidence that the Secretary of Agriculture made the finding, required under 16 U.S.C. §688, that the Disney project would be consistent with the statute's purposes. See *Citizens to Preserve Overton Park v. Volpe,* 39 U.S.L. Week 4287, 4293 (U.S. March 2, 1971). The requirement of a finding is significant; it is clear from this record that the Secretary of Agriculture could not rationally have made it and could not, therefore, have approved the project. If Agriculture had found that Disney's use would not interfere with game in the Refuge, or its habitat, that finding would have been arbitrary, capricious and an abuse of discretion.

The Secretaries are under pressure to commit public lands to commercial exploitation, both to justify budgetary requirements of their agencies and to please powerful and persuasive applicants for development permits. In dealing with large areas of ordinary federal lands, the Secretaries have broad discretion. In dealing with Sequoia National Park and Sequoia National Game Refuge, their discretion is greatly limited by statute because those portions of the public lands are not merely valuable real estate but a priceless national resource.

The Ninth Circuit erred in finding that Judge Sweigert abused his discretion when he so interpreted the limits of permissible administrative action allowed to the Secretaries. The succeeding sections establish that point as a matter of law.

B. The Ninth Circuit's Decision Has Repealed the Statute Limiting the Size of Private Developments in National Forests.

Congress has authorized the Secretary of Agriculture to permit long term private recreational use of national forest land throughout the United States in only one statute, enacted in 1915 and amended in 1956: 38 Stat. 1101, 70 Stat. 708, 16 U.S.C. §497.

Under that statute, the Secretary may ". . . permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety, . . ."

Disney could not locate all major and indispensable components of its planned development on 80 acres at Mineral King. The project simply is too large for that. The record shows that ski lifts, towers, sewage treatment facilities and parking structures would be located on land in excess of that limit.[7]

In its effort to circumvent the 80 acre limitation, Agriculture proposed to cover the necessary additional acreage with a second permit characterized as "terminable" (A. 169). The statute which is offered in justification for this permit is 16 U.S.C. §551, under which "The Secretary of Agriculture . . . may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; . . ."

The Ninth Circuit committed three fundamental errors in failing to recognize that neither 16 U.S.C. §§497 and 551 nor any other authority, afford Agriculture discretionary power to permit long-term recreational use of

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[7]Opposing certiorari, the Government erroneously suggested that Disney's major facilities would be located only on the 80 acres of National Forest land covered by the term permit issued pursuant to 16 U.S.C. §497. They referred specifically to "parking lots". (Def. B. 3)

The record shows that a five story parking structure, sewage treatment facilities and ski lifts would be included in those major features which would be located outside the 80 acres on land to be covered by the so-called "revocable", supplemental permit (A. 15, 23, 31). The District Court so found (A. 188). The Ninth Circuit did not overrule this finding, observing "that *most* major improvements are to be located upon lands held under the eighty-acre term permits (sic) . . ." (A. 229)

more than 80 acres of national forest land at Mineral King.

The first error came when the Ninth Circuit completely ignored the acreage limitation of Section 497. It committed the second when it concluded that Agriculture may permit the indefinite use of national forest land under Section 551, without specific Congressional authority, under a permit not truly revocable at will. The third error came when the court relied upon other instances in which a combination of term and revocable permits has been employed to establish the legality of the permits challenged here.

1. Congress Intended to Limit Recreational Developments on National Forest Land to 80 Acres.

The Ninth Circuit's first error was that it assumed that Section 497 was not intended to limit the size of long-term recreational uses of national forest land. It concluded that Section 497 was enacted solely to provide the certainty of tenure demanded by lenders before they would finance recreational developments. If that had been the purpose, no area limitation would have been required. The statute need only have assured that the permit would be valid for a term of years.

In fact, the legislative history of Section 497 fully supports the clear intention of Congress expressed in the statute that long term use of national forest land for recreation be restricted to developments not exceeding 80 acres.

In its original form, Section 497 authorized permits covering up to five acres with a term not to exceed thirty

years for summer homes, hotels, stores and other structures needed for recreation or other public convenience.[8]

The first change in the five-acre limit came in 1948 when Congress increased to 80 acres the permissible area for recreational developments in the Territory of Alaska (48 U.S.C. §341). Then Acting Secretary of Agriculture Charles F. Brannan urged the increase on the basis that while 5 acres was adequate for such purposes as a "summer home or a small resort", it was inadequate "for the increasingly common type of outdoor camp or lodge with associated dwelling units *and service facilities.*" (S.Rep. No. 899, 80th Cong., 2d Sess., 1948; 1948 U.S. Code Cong. and Adm. News at 1337). (Emphasis added).

Significantiy, Secretary Brannan went on to say: "Winter-sports facilities are often strung out, especially ski lifts, etc., and need elbowroom." (*Ibid.*). Thus Brannan sought to have his authority expanded from 5 to 80 acres so that "*service facilities*" and winter sports facilities, such as "ski lifts" might be included within 80 acres. He thereby acknowledged and represented to Congress that such facilities must fall within the 80-acre limitation.

The bill as introduced was not restricted to Alaska. It covered national forest land generally. Congress manifested its resistance to overdevelopment of the national

[8]"That hereafter the Secretary of Agriculture may, upon such terms as he may deem proper, for periods not exceeding thirty years, permit responsible persons or associations to use and occupy suitable spaces or portions of ground in the national forests for the construction of summer homes, hotels, stores, or other structures needed for recreation or public convenience, not exceeding five acres to any one person or association, but this shall not be construed to interfere with the right to enter homesteads upon agricultural lands in national forests as now provided by law." March 4, 1915, 38 Stat. 1101.

forests in the following passage from the report of the House Committee on Agriculture:

> "Because of the possibility that provisions of the bill might be applied, with effects not as desirable as would be the case in their application to Alaska, the committee's amendments provided for that specific use only." Incorporated in S.Rep. No. 899, 80th Cong., 2d Sess., 1948; 1948 U.S. Code Cong. and Adm. News at 1337.

The reasons advanced by the Secretary of Agriculture in 1956 for his support of the legislation to expand his term permit authority to 80 acres throughout the United States were almost identical with those advanced in 1915 and again in 1948. Acting Secretary True D. Morse, writing to the Chairman of the Senate Committee on Agriculture and Forestry on August 5, 1955, stated:

> "Under existing laws this Department has adequate authority to issue revocable permits for uses for which long-term tenure is unnecessary or *undesirable*. . . .
>
> *"The act of March 4, 1915, however, is inadequate* to meet other needs for term permits on the national forests *because it limits use and occupancy* to summer homes, hotels, stores, or other structures needed for recreation or public convenience, and the permit area *to a maximum of 5 acres.* It is frequently found that term permits would be desirable for uses not specified in the act of March 4, 1915, and *permittees often need more than 5 acres for their authorized operations.*
>
> *"S. 2216 would meet needs to grant term permits up to 80 acres for* such public and semipublic uses as landing fields, resorts, campgrounds, picnic areas,

> organization camps and *ski lifts* and to industrial and commercial enterprises such as sawmills, mining camps, wharves, and warehouses, which would contribute to the general welfare and which could be located so as not to interfere with the proper utilization of national-forest resources." S.Rep. No. 2511, 84th Cong., 2d Sess. 3, 1956 (Emphasis added).

Congress yielded to this pressure and raised the acreage limitation to 80. At the same time, it again manifested its intention to limit the size of developments in the national forests. For the first time, it specifically required that, in addition to hotels, resorts and structures, this 80 acres must include "*any . . . facilities* necessary or desirable for recreation, public convenience, or safety." 70 Stat. 708 (16 U.S.C. §497).

The Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§528-531 in no way repealed clear limits upon the power of Agriculture set forth in Section 497. The purpose of the 1960 legislation was to make explicit that which had been implicit for many years, namely, that Agriculture's responsibilities include management of national forests for recreation, range and wildlife purposes as well as for preservation, watershed management and timber production. (H.Rep. No. 1551, House Committee on Agriculture, 86th Cong., 2d Sess., 1960; 1960 U.S. Code Cong. and Adm. News 2377.)

2. Agriculture May Not Permit Use of Public Land Without Express Congressional Authority Unless the Permit is Revocable at Will.

The second fundamental error of the Ninth Circuit came in its assumption that the Secretary of Agriculture may permit a use and occupancy of national forest land

under a so-called "revocable permit" when the use and occupancy is not truly revocable at will.

a. *The Supplementary Permit is Not Revocable at Will.*

The so-called "terminable" or "revocable" permit involved in this matter is neither. It is a completed version of Form 2700-4 (A. 23) specified for use by the Forest Service Manual, Section 2711.1-3 (B.A. xvii). An examination of this form reveals that, though characterized as an annual permit by Agriculture, it is not an annual permit in any sense of that word. The length of its term is not mentioned. Rather, the Forest Service Manual itself (Section 2711.1-5, October 1968, Amendment No. 12, B.A. xvii) conceives of the duration of such a permit as the time of "actual need". The only reference to "annual" is in provisions for payment found in Section 1 (A. 23).

The only provision dealing with termination is in Section 15 (A. 24). The section states that "this permit may be terminated upon breach of any of the conditions herein or at the discretion of the Regional Forester or the Chief, Forest Service".

The rights of the permittee under an annual permit charged with a breach of condition are the same as in the case of a thirty-year permit. He is afforded an opportunity to cure after notice (F.S.M. 2716.3, B.A. xvii).

"Discretion" as used in Section 15 is not absolute or uncontrolled. This is evidenced by the extensive appellate procedures established before *any* permits, including "annual" permits, may be revoked with finality. Under procedures established by the Secretary of Agriculture ("Appeals From Administrative Decisions Relating to the Ad-

ministration of the National Forests or other lands under administration of the Forest Service", 36 C.F.R. §211.20-§211.119), Disney could appeal any revocation. Such an appeal tests the *grounds* upon which the permit was revoked. The existence of an appellate procedure means that the exercise of discretion must be a reasonable exercise. The Secretary could not destroy a 35 million dollar investment at his whim and caprice. Certainly this would not be permitted by any court to whom Disney ultimately would have recourse. Judge Sweigert observed that "[t]hese provisions strongly suggest to the Developer that the so-called "revocable" permit is not really revocable 'at will' . . ." (A. 191).

From an economic standpoint, it is *inconceivable* that prior to the expiration of the thirty-year term, the Forest Service would require Disney to remove the parking structure, ski lifts and other indispensable facilities located outside the 80 acre limit and installed under this permit. This would destroy the value of facilities located within that limit.

Without lifts, sewage disposal facilities, roads, avalanche dams and the parking structure, the ski resort could not exist. Removal of these facilities would effectively destroy the entire 35 million dollar investment, including the value of those facilities "protected" by the thirty-year term permit. The "chilling effect" of all this upon the free exercise of any forest service management authority would be extreme.

Thus, this so-called "revocable" permit, when so inexorably tied by money, improvements and use to a thirty-year term permit, is in reality a thirty-year term

permit. As a matter of fact it would never be revoked. As a matter of law, it takes on the character of a license coupled with an interest and thus is irrevocable for so long as the term use with which it is intertwined continues.

The District Court summarized the situation very well, recognizing that

> "It is inconceivable that Agriculture would, or could under the terms of the 'revocable' permit and the circumstances of its issuance, suddenly and 'at will' require the Developer to remove ski lifts, towers, refuse and sewage disposal, parking areas and roads covered by that permit and thus effectively destroy the 35 million dollar investment made by the Developer under his 30 year 80-acre term permit." (A. 191-92).

b. *Agriculture is Without Authority to Issue Such a Permit*

The Ninth Circuit erroneously decided that a revocable permit need not be terminable "at will" (A. 228). This suggestion is at the heart of its decision reversing Judge Sweigert. The decision has the effect of repealing 16 U.S.C. §497; it is at odds with Article IV, Section 3, clause 2 of the United States Constitution which vests exclusive power over public lands in the Congress; and it is in conflict with relevant opinions of the courts and the Attorney General.

The Ninth Circuit relied upon a 1905 opinion of the Attorney General[9] and upon a failure of the court to

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[9]See opinion and footnote 12 at A. 227.

discover any requirement "that a revocable permit be terminable 'at will'" outside a 1928 Attorney General's opinion which had been cited by counsel for the Secretary of Agriculture (A. 228).

First, the Secretary's general regulatory power over national forests under 16 U.S.C. §551 is not a basis for a permit granted for "the time of actual need" or any other indefinite duration. The Ninth Circuit dealt with this issue in *Osborne v. United States,* 145 F.2d 892 (9th Cir. 1944). It found that a permittee was not entitled to a condemnation award when his grazing permit issued under Section 551 was terminated. It stated:

> ". . . No grant of United States property may be made except by virtue of Congressional authorization (Art. 4, §3, Const.; *Shannon v. United States, supra*), and the mere authority given the forest service to make appropriate regulations carries with it no authority to alienate for any period of time any phase of government right over the full use of its lands. . . .
>
> "It is safe to say that it has always been the intention and policy of the government to regard the use of its . . . national forests, under regulation through the permit system, as a privilege which is *withdrawable at any time.* . . ." 145 F.2d at 896 (Emphasis added).

Section 497 is the only relevant source of authority.

The Ninth Circuit erred in relying upon the 1905 Attorney General's Opinion for its conclusion that a permit issued under Section 551 need not be revocable at will. That opinion, which dealt with the use of forest lands for a fish salter, oil and fertilizer plant, sanctioned

the grant of a permit for a duration which ". . . under the circumstances of each case would seem reasonable" based upon the following statement:

> "The legislation expressly referring to forest reservations is silent with reference to the period for which the permits may be granted, and my attention has not been called to any other statutory provision which can be said to limit your action in this connection." (25 Op. Atty. Gen. 470, 472 (1905)).

The legislative silence was ended ten years later when Congress enacted 16 U.S.C. §497. This section established clear limits of power which the Secretary of Agriculture could not circumvent by issuing supplementary permits not truly revocable at will.

While he was the Attorney General, Chief Justice Harlan Fiske Stone was asked to review an agreement between the Secretary of the Navy and a licensee of certain government owned patents. He examined the Constitutional limitation upon the disposal of public property which is applicable to all departments of government and stated that:

> "No public property can, therefore, be disposed of without the authority of law, either by an express Act of Congress for that purpose, or by giving the authority to some Department of the Government, or subordinate agent." See also *Wisconsin R. Co. v. Price County,* 133 U.S. 496, 504. . . . [t]his prohibition extends to any attempt to alienate a part of the property, or in general, in any manner to limit or restrict the full and exclusive ownership of the United States therein" (34 Op. Atty. Gen., 320, 322 (1924)).

He found that the executive may grant a revocable license, and stated the limit of this power, as follows:

> "But, as pointed out in 22 Op. 240, 246, the power to issue such revocable licenses, inasmuch as they vest no estate, interest, or franchise and confer no right whatever to the continuance of the permission thereby given, has been habitually exercised as an incident of the power of management and control, whenever, in the Secretary's judgment the permission will subserve the interests of the Government. . . .
>
> '. . . It being clearly understood that such permission creates no right, interest, or franchise in the license and that, however long continued, *the occupancy is subject in theory and in fact to immediate termination at any time at the will of the Government*'." (*Id.*, at 327, 328) (Emphasis added).

Without this limitation of power, those statutes, including 16 U.S.C. §497, which set acreage limits upon the use of public lands would be without meaning.

The Ninth Circuit interpreted the decision of the District Court to mean that term and revocable permits never may be employed on the same project. In fact, nothing in Judge Sweigert's opinion supports this interpretation.

Neither the District Court nor the Club has dealt with circumstances or permits outside this case. The Sierra Club does not challenge the legality of existing recreational developments which involve a combination of term and revocable permits. It does deny the legal authority of the Secretary of Agriculture to permit the long-term location of indispensable facilities on, and the long-term use of, more than 80 acres at Mineral King.

3. Other Instances of Combined Permits Do Not Legalize the Combination At Mineral King.

The Ninth Circuit committed its third error when it decided that combinations of term and revocable permits for other recreational developments on national forest land confirm the legality of such a combination at Mineral King.

At the outset, even if the Forest Service had a uniform practice of issuing a combination of term and supplemental permits to evade the 80-acre limitation on long-term use, that would not be proof of the legality of the permits at Mineral King, convincing or otherwise. The administrative interpretation, while consistent, would be illegal.

The record before the District Court reflects only the bald assertion of a Forest Service employee in his affidavit that "[t]here are now in the United States a total of at least 84 recreational developments on national forest lands in which there is such a combination of a 30-year term permit and terminable permits . . ." (A. 169). Significantly, there is no assertion anywhere in the record that indispensable facilities were erected at any of those ski areas *outside* the 80 acres covered by the term permit.

Nor did the Ninth Circuit have before it any evidence of a consistent administrative practice of employing combined permits covering indispensable facilities to circumvent the 80 acre limitation of Section 497. In fact, if the Government had introduced any evidence, it would have established that there has not been a consistent administrative practice. This Court may take judicial notice of the fact that the combined permits which have

been issued for ski resorts by the several Forest Service regional offices manifest a wide spectrum of practice.

In some instances, the issuing authority has sought to uphold the limits set in Section 497. Some permits bar the location of any improvements on land other than that covered by the 80 acre term permit.[10] In other instances, apparently responding to the recent demand for larger ski facilities, Regional Foresters have sought to circumvent the 80 acre limit employing the device of a supplemental permit.[11]

It can be argued that there is administrative practice *upholding* the acreage limitation and the plain meaning of Section 497. In fact, there has not been a consistent administrative interpretation disregarding that plain meaning. At best, the practice followed by the Forest Service is equivocal. It certainly does not furnish a basis for deciding the legality of the particular combination of permits at Mineral King nor prevent this Court from interpreting the 80 acre limitation of 16 U.S.C. §497.

Nor may it be asserted that Congress either approved evasion of the 80 acre limit when it amended Section 497 in 1956 or that it has acquiesced in any such evasion since 1956. If Forest Service Headquarters in Washington, D.C., has been aware of any such practice, it has not issued a ruling or regulation confirming it prior to the 1956 amendment to Section 497. Neither has it done

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[10]See e.g. permits issued on September 18, 1963 by Forest Service Region 3 to Lake Peak Corporation of Santa Fe, New Mexico and on December 18, 1962 by Forest Service Region 2 to Buttermilk Mountain Skiing Corporation of Aspen, Colorado.

[11]See e.g. permits issued on June 2, 1967 by Forest Service Region 6 to Alpental Land Company of Lakeview, Washington.

so since that time. Therefore, Congress is not presumed to have ratified the interpretation when it amended 16 U.S.C. §497 in 1956. *Commissioner v. Lake,* 356 U.S. 260, 265 fn 5 (1958); *Helvering v. New York Trust Co.,* 292 U.S. 455, 468 (1933). "To find significance in congressional non-action under these circumstances is to find significance where there is none." *Toucey v. New York Life Insurance Co.,* 314 U.S. 118, 141 (1941).

The District Court correctly observed that if Congress, when enacting and amending the acreage limitation, had in mind that it could be circumvented or nullified in this fashion, ". . . it could have spared itself time and trouble by omitting any area limitation—or by otherwise indicating its intent." (A. 192).

A decision that the combination of permits at Mineral King is illegal, if it cast doubt upon the legality of any existing resorts, could be limited in its application to *Mineral King and future developments.* The broad power of the Court to limit retroactive application of its decisions has been confirmed repeatedly. *Cipriano v. Houma,* 395 U.S. 701, 706 (1969); *Grt. Northern Ry. Co. v. Sunburst Co.,* 287 U.S. 358, 364 (1932).

C. Authorization of Disney's Huge Resort in a National Game Refuge Was Illegal.

In 1926, Congress greatly expanded and adjusted the boundaries of the Sequoia National Park. The legislation[12] also created the Sequoia National Game Refuge, which is surrounded on three sides by the Park. Mineral King valley is entirely within the Game Refuge.

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[12]44 Stat. 821 (1926).

The Game Refuge comprises about 15,000 acres tied to the surrounding Sequoia National Park for all eternity by its geographic and ecological characteristics. "It has essentially the same flora and fauna as the Park, including some giant Sequoias at lower elevations". (A. 26).

Earlier bills for the enlargement of Sequoia National Park had included the Mineral King enclave in the Park.[13] It was omitted only because Congress believed that it should not impede the insignificant mining activity at Mineral King.

This fact, and Congress' concern that Mineral King receive special treatment as a habitat for game are confirmed in hearings on the legislation. Then Forest Service Chief W. B Greeley testified before the House Committee on Public Lands as follows:

> "The Chairman. Will the game refuge be subject to grazing?
>
> Mr. Greeley. I *think not*. There may be a little grazing in there, but practically none.
>
> The Chairman. You will not permit grazing in there?
>
> Mr. Greeley. No, sir; grazing ought to be excluded from the game refuge area.
>
> The Chairman. If the game refuge area were in the park addition it would really be a game refuge, would it not?
>
> Mr. Greeley. Yes, it would be a complete game refuge.
>
> The Chairman. What is the particular reason for segregating this and setting it aside as a game refuge?

[13]See H.R. 5006, 66th Cong., 2d Sess. (1920).

Mr. Greeley. In the first place we felt that the Mineral King area should be kept out of the park, because there is a considerable section of mineralized territory there that has been prospected and mined in a small way for a good many years. Now, leaving that out of the park, you can readily appreciate that with the park boundaries surrounding this little peninsula of natural forest land, all but the little neck, it would be extremely easy to have poaching on park lands if hunting were permitted on the national forest lands. Aside from that there is a very valuable deer herd in this region partly in the national forest and partly in the present park, and we think as a matter of game conservation it is desirable to enlarge somewhat the area subject to special protection. This is one of the big breeding grounds of deer for the whole southern Sierra region.

The Chairman. Prospecting will be permitted in the game preserve, will it?

Mr. Greeley. Yes; all national forest uses, not inconsistent with a game refuge will be permitted there. That will include prospecting.[14]

What emerged was 16 U.S.C. §688, which reads as follows:

"All parts of township 17 south, ranges 31 and 32 east, and township 18 south, range 31 east, Mount Diablo base and meridian, which are north of the hydrographic divide passing through Farewell Gap, and which are not added to and made part of the Sequoia National Park by the provisions of sections 688-689d of this title, are designated as the Sequoia National Game Refuge, and the hunting, trapping,

[14] *Hearings on H.R. 9387 before the House Committee on Public Lands*, 69th Cong., 1st Sess. 57, 58 (1926).

killing, or capturing of birds and game or other wild animals upon the lands of the United States within the limits of said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture; *Provided,* That *it is the purpose of this section to protect from trespass the public lands of the United States and the game animals which may be thereon,* and not to interfere with the operation of the local game laws as affecting private or State lands: *Provided further,* That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto *so far as may be consistent with the purpose for which said game refuge is established.*" (Emphasis added.)

Congress expressly protected the lands of the Refuge from trespass and protected the game animals which might find their way to Mineral King. As the statute and the hearings reveal, Congress did not intend to prevent all entry to the lands. In barring "trespass" on the lands, it was protecting the habitat of the game. Prospecting was allowed. By contrast, the Forest Service represented to Congress in the hearings that grazing, which would diminish the quality of the habitat, would be barred.

Now, Agriculture proposes to permit dedication of the Refuge to a private construction project including 20 ski lifts, manicured slopes, hotels and lodges, 10 restaurants, a chapel, convenience and specialty shops, conference center, swimming pools, theatre, general store, 5-story

parking facility, hospital, sewage treatment plant, housing for over 700 employees and 14,000 customers (A. 5-6, 27, 32, 53a-c, 143, 204). That usage would produce nearly twice the concentration of persons found in Yosemite Valley at the peak of activity there (A. 28).

The horrendous impact of such use on the small and fragile Game Refuge is apparent. California Fish and Game Commission personnel have stated "that in an extensive development such as the Disney proposal, considerable wildlife habitat would be lost and wildlife would suffer from human encroachment." (A. 76).

The Forest Service itself, through its Range & Wildlife Management section, has admitted facts which establish that the Disney use would have been inconsistent with the purposes of the Game Refuge. An internal Forest Service memorandum observes:

> "*The total basic concept of development appears badly biased in orientation toward a highly artificial, continued situation, without any real attention to ecological factors* . . . . The extent and nature of proposed alteration of the basin is unacceptable to to us—the damages extend beyond effects on fish and wildlife, and these alone are critical.
>
> "Specifically, stream diversions and channel treatment, flood and debris control, surface water supply development, and sewage disposal proposals are all of a nature we find severely damaging or unacceptable.
>
> "*It is recognized that development of high intensity year-round recreational use in this restricted fragile sub-alpine area is bound to result in pronounced impacts and certain unavoidable changes*" (A. 131). (Emphasis added.)

Disney itself has said that:

> "Grooming and manicuring of most slopes without destroying the naturalness of the area, particularly for intermediates, will require extensive bulldozing and blasting in most lower areas and extensive rock removal at higher elevations. This is especially true for the Mosquito, Eagle and White Chief Bowls and the lower Farewell Canyon area." (A. 32).

Agriculture has made no finding that the proposed ski resort is a use consistent with the National Game Refuge. This failure was an abuse of discretion. More significantly, a finding that Disney's "wonderland" was a use consistent with the purposes for which the Game Refuge was established would have been arbitrary and capricious. It is pure sophistry to suggest a finding that bulldozing, blasting and manicuring for 14,000 skiers per weekend is a use consistent with a game refuge.

The Ninth Circuit's response to all of this was to quote from the first few lines of Section 688, leaving out its statement of purpose and to conclude that it found "no substance in this argument." (A. 234). That court made no attempt to define the limits of the power of Agriculture to permit uses within the Game Refuge. This Court must correct that error if Sequoia National Game Refuge is to be preserved from destruction.

D. Interior May Not Approve a Highway Across a National Park For a Non-Park Purpose.

The Secretary of the Interior acted illegally in approving a construction across Sequoia National Park of a freeway to serve a non-park purpose. That purpose is to link the state highway system located outside of the

park to the west with Mineral King located outside the Park to the east.

The District Court doubted the legality of the new freeway. Those doubts were brushed aside by the Ninth Circuit. It relied on its observations that the new freeway through the Park would replace a substandard road which is "legal". The Ninth Circuit observed that the adverse impact upon the Park would be minimized and that under 16 U.S.C. §8 the Secretary has broad discretion to construct roads in national parks.

The Ninth Circuit failed to define the applicable limits of the Secretary's power. Congress has authorized him "to promote and regulate the use" of parks only

> " . . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment for future generations." 16 U.S.C. §1.

By this enabling legislation, Congress limited the Secretary's authority to make any changes from the natural state to those which serve, or conform with, a park purpose.

Nevertheless, the Ninth Circuit evidenced no interest in the purpose of the freeway. It did not challenge the conclusion of the District Court that the freeway would serve as a connecting link to a destination outside the Park. Nor has the Secretary denied, because he cannot, that the sole impetus for the freeway was the Disney

project, a non-park purpose. The National Park Service has no plan to develop the portion of the Park touched by the freeway (A. 36). Any benefit to the Park in the form of increased access to the areas traversed is fortuitous.

In his consultation for Interior, highway design engineer John Clarkson identified the adverse effect upon the park, its game and other values as follows:

> "Obviously, any road construction to present-day standards could not be built through this area without affecting the ecology of the area. Within the road prism (cuts and fills) plant life would, of course, be disturbed, and since the top soil for regenerating plant life is sparse, early vegetative cover on cut and fill slopes would be very slow in developing.
>
> "More than that, the road, if primarily based on cut and fill construction, would be a barrier to wild life and visitor movements throughout this area of the park. Animals and men would have to cross the road to the risk of not only of such persons and wild life but also to the risk of users of the highway." (A. 142).

The Ninth Circuit failed to recognize that Interior may permit within national parks only those alterations which serve a park purpose. The Ninth Circuit thus saw the challenge of the Sierra Club as nothing more than a quarrel with the Secretary's exercise of his discretion. This was its fundamental error.

The Club does *not* challenge the broad management prerogatives of Interior to decide what best serves park purposes. It does challenge his power to approve de-

struction of park values and construction of a freeway not conceived to satisfy a park purpose.

The Ninth Circuit is equally wrong when it suggests that, having once acted outside his authority by approving a non-park-purpose freeway, the Secretary may cure the illegality with construction techniques designed to minimize the adverse effect upon national park values. This interpretation would deprive the statute of any meaning. It is tantamount to a statement that the Secretary may ignore statutory limits on his powers so long as he does so carefully.

Recent legislation reinforced the conclusion that Congress recognizes the destructive effect of highway construction in national parks and intends that it be avoided.

The Department of Transportation Act of 1966[15] along with the Federal Aid to Highway Act of 1968[16] bar the

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[15]"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, of any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use." 49 U.S.C. § 1653(f) (Supp. V).

[16]"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and water-

use of federal funds to finance the construction of highways through public parks if a "feasible and prudent" alternative route exists. This Court found in *Citizens to Preserve Overton Park v. Volpe,* 39 U.S.L. Week 4287 (U.S. March 2, 1971) that only the most unusual situations are exempted from that bar. It also found that "If the statutes are to have any meaning, the Secretary cannot approve the destruction of park land unless he finds that alternative routes present unique problems." 39 U.S.L. Week at 4290.[17]

Interior Secretary Stewart Udall was pressured to approve the highway because, while the route across the Park was not the only available avenue, it was the cheapest. The record shows that at least two other routes which would avoid traversing the surface of the Park are available, each of which has been less attractive because of cost (A. 66).

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fowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use." 23 U.S.C. § 138 (Supp. V).

[17]Three million dollars in federal funds from the Economic Development Administration are allocated to construction of the Mineral King Highway (A. 161).

The enactment of 16 U.S.C. §8[18] in 1924 authorizing the Secretary to construct park roads did not broaden his authority. Neither the statute nor its legislative history suggests that Congress intended to exempt roads from the park purpose requirement of 16 U.S.C. §1. Section 8 was the first section of an appropriation measure motivated by the necessity of repairing existing roads. The report of the House Committee on the Public Lands following its consideration of the bill which became 16 U.S.C. §8, includes a letter from Secretary of the Interior Hubert Work in which he confirms this, as follows:

> "In my opinion the most urgent demand of the national parks to-day is for the reconstruction of most of the existing roads within their borders to measure up to the high standard of the roads constructed or being constructed to their boundaries by the United States or by the various States either with or without Federal aid, and for a few new roads .... Practically all roads in the national parks were originally built for horse-drawn vehicular traffic, and with the advent of the automobile have proven inadequate .... For automobile use the existing park roads are in many instances too narrow for safe driving, contain too much adverse grade, and particularly have not the base to withstand the continuous and severe pounding of modern high-powered motor vehicle travel ...."
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> H.Rep. No. 258, 68th Cong. 1st Sess. 2 (1924)

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[18] "The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior." 43 Stat. 90.

Further evidence of Congressional intent is found in a 1962 report of the House Committee of Interior and Insular Affairs dealing with the establishment of the Padre Island National Seashore:

> "As introduced, the House bills required construction of a roadway the full length of the national seashore and roads beyond its northern and southern boundaries *to connect with* existing road systems from the mainland to the island.
>
> "The national Park Service already has authority to construct within any area which it administers such roads and trails as are needed for public use of the area (act of Apr. 9, 1924, 43 Stat. 90, 16 U.S.C. §8). *The committee is of the opinion that to require the National Park Service to construct a through highway for general public convenience in the Padre Island National Seashore would give it a function which does not properly belong to it* and also that, considering the narrowness of the island, such a roadway might well spoil the very assets which the creation of the national seashore is intended to preserve. . . ." H.Rep. No. 2179, 87th Cong., 2d Sess., 1962; 1962 U.S. Code Cong. & Adm. Serv. 2717 (Emphasis added).

Finally, in 16 U.S.C. §8 Congress granted the authority to construct roads only to Interior. Interior's present plan to permit the State of California to build a road through Sequoia National Park is a delegation of power nowhere authorized by statute. It also confirms the absence of a park purpose.

The Secretary of the Interior has violated not only the Congressional mandate but his own administrative

guidelines as well. Interior's Park Road Standards Committee put it as follows:

> " . . . Park roads are not continuations of the State and Federal network. They should neither be designed—nor designated—to serve as connecting links. Motorists should not be routed through park roads to reach ultimate destinations." Park Road Standards, U.S. Department of the Interior, National Park Service, May, 1968.

The existence of a narrow, low-standard road (in place before Sequoia National Park was established) does not justify a new high-standard freeway along a parallel route.*

The new highway would not trace old ecological scars (A. 73). In order to produce a high volume of traffic, the proposed freeway must be on a new routing, with new and much larger cuts, fills and structures all productive of an adverse effect upon scenery, ecology and park values (A. 142).

The present road is neither "legal" nor "illegal" in the sense employed by the Ninth Circuit. The Secretary of the Interior was not called upon to authorize it since it was already there when Sequoia National Park was

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*Debate on one of the measures to expand Sequoia National Park confirms the legislative intent to restrict the location of new roads:

> "Mr. Rankin: How about roads and driveways through it?
> "Mr. Barbour: I will say to the gentleman it is proposed to make this a trail park and keep it a trail park. It is now a trail park. The roads now leading into the park go into the Giant Forest of the present park. This territory which it is proposed to add is in the high mountains further up and further back and there are no roads contemplated into this area at the present time." 67 Cong. Rec. 10143 (1926).

established. The Sierra Club does not challenge his exercise of discretion in permitting the old road to remain in use.

Even if the old road had been authorized by the Secretary operating within his authority, that could not determine the legality of every other highway connecting the same points. If this were the law, as suggested by the Ninth Circuit, any number of highways automatically would be legal whatever their route, size or even purpose as long as they had termini in common with the first road.

To recapitulate, the Ninth Circuit gave its blessing to the proposed highway on the basis of these propositions:

1. Notwithstanding 16 U.S.C. §1, requiring a park purpose, the Secretary of the Interior may authorize a freeway across a national park for a non-park purpose.

2. Notwithstanding 16 U.S.C. §8, which permits only the Secretary to build park roads, he may delegate the right to build those roads to others.

3. The fact that a minor, low-standard road in existence before the Park was founded already crosses it justifies a new freeway across the Park along a different route.

To state these propositions is to refute them. Judge Sweigert saw the matter correctly. The Ninth Circuit erred in reversing him.

E. Interior Has Violated Its Own Rules And Abused Its Discretion In Failing To Conduct Hearings On The Freeway Across The Park.

On January 29, 1969, the Secretary of the Interior adopted and published regulations entitled "Roadbuilding in National Parks" (34 Fed. Reg. 19 (January 29, 1969)). These regulations, quoted in relevant part in the Brief Appendix, call for both a corridor and a design public hearing in the case of "each major road project that would have a substantial social, economic, or environmental effect."

When the project involves improvement of an existing road, a single hearing is called for "if the project would have a substantial social, economic, or environmental effect."

The application of these rules to the proposed high-volume freeway could hardly be clearer. Under them, the Secretary of the Interior would have no choice but to grant a hearing prior to issuing a construction permit. When this lawsuit was filed, he was threatening to grant the permit without a hearing.

It is an elementary principle of administrative law that an agency must comply with its own regulations and that agency action taken in defiance of its own regulations is invalid without regard to the merits of the decision reached. *SEC v. Chenery Corp.*, 318 U.S. 80 (1942); cf. *Pacific Molasses Co. v. FTC*, 356 F.2d 386, 387, 389 (5th Cir. 1966).

But the Secretary of the Interior, on April 21, 1969, purportedly revoked the "Roadbuilding in National

Parks" regulations, "effective immediately." His "revocation", as published in 34 Fed. Reg. 6985 (April 26, 1969) reads, in its entirety, as follows:

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"Office of the Secretary

"ROADBUILDING IN NATIONAL PARKS

"Revocation of Procedures

"Notice is hereby given that the procedures adopted on January 18, 1969, and published in the FEDERAL REGISTER on January 29, 1969, 34 F.R. 1405, regarding the location and design of major road projects in the National Park System administered by the Department of the Interior are revoked, effective immediately.

"Issued in Washington, D.C. on April 21, 1969.

WALTER J. HICKEL,
Secretary of the Interior"

By statutory definition, repealing a rule is just as much "rule making" as formulating it in the first place. (5 U.S.C. § 551(5)). Secretary Hickel's "revocation" is completely inadequate and improper on numerous grounds set forth in the Administrative Procedure Act.

1. It does not give notice of proposed rule-making as required by 5 U.S.C. § 553(b). See also *Pacific Coast European Conference v. United States*, 350 F.2d 197 (9th Cir. 1965);

2. It does not include a statement of the time, place, or nature of public rule-making proceedings as required by 5 U.S.C. § 553(b) (1);

3. It does not make a reference to the legal authority under which the rule (revocation) is proposed, as required by 5 U.S.C. § 553(b) (2);

4. It completely deprives interested persons of any opportunity to participate in the proposed rule-making in any way, shape or form, in violation of 5 U.S.C. § 553(c).

The Secretaries argued below that the protections set forth in 5 U.S.C. §553(c) were inapplicable to Secretary Hickel's purported revocation because the regulation dealt with matters which are excepted from its coverage. Concerning those exceptions, the District Court doubted whether the "rule calling for public hearing concerning major road projects having substantial social, economic or environmental effects is a mere rule of procedure, practice or policy" (A. 197).

The Ninth Circuit did not deal with these issues. It did not find that the purported revocation was effective or that a hearing was unnecessary. Instead, it attempted to find that any hearing requirement had been satisfied, referring to a hearing conducted by the State of California in 1967 and to a promotional meeting sponsored by the Tulare County Chamber of Commerce in 1953.

The 1967 State Division of Highways hearing was not the forum in which the limits of power of the Secretary of the Interior could be examined. But in any event, at that time, the Secretary was adamant in his opposition to the highway (A. 65).

Nor was the Tulare County Chamber of Commerce pep rally of 1953 (A. 43) a hearing in which the re-

quirements of the Secretary of the Interior's 1969 road building regulations could be met.

Even the Secretaries, in their opposition to the petition for certiorari, agreed that if the regulation was not repealed, a hearing was necessary (R.B. 13).

There is no evidence that Congress intended to exempt all rule-making activities of the Secretary of the Interior from the protections of the APA. Congress did intend to exempt from normal rule-making requirements those situations where "the Government is in the position of an individual citizen and is concerned with its own property, funds, or contracts".[19] We are not dealing with that exception here. The Secretary of the Interior holds national parks not in the absolute property ownership sense of a private citizen, but rather in trust to be maintained in their natural state for present and future generations.[20] This trusteeship requires that rules and regulations affecting those parks be open to public comment and participation.

The vice of the Secretary's abortive attempt to revoke the rule calling for hearings might have been insignificant if he had replaced the guarantee of public participation in road construction issues with a similar guarantee for all phases of the planning process. He stated.

> "Since the location and design of park roads is only one of several important factors in the planning process, it is not logical to single out the road con-

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[19]Congressman Walter, co-author of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. 358 (1946).

[20]16 U.S.C. § 1.

struction aspect of planning for public discussion. All phases should be subject to comment from the public." (A. 74).

The Secretary has done nothing to make good on this promise and as to this most controversial highway whose purpose is to serve as a connecting link to a huge private resort, he has neither announced a public hearing nor solicited any public comment.

The purported "revocation" of the rule requiring hearings was invalid and ineffective. The Secretary's failure to comply with his own regulation was a continuing violation of law, arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law within the meaning of 5 U.S.C. §706(2).

F. Congress Alone May Authorize a Transmission Line Within Sequoia National Park.

The Disney projec contemplates a 66,000 volt power transmission line across Sequoia National Park which would be constructed without Congressional approval (A. 39-40). The line would serve no park purpose, being intended solely to satisfy the energy requirements of Mineral King.

From his examination of 16 U.S.C. §45(c) together with other legislation dealing with the powers of Interior concerning location of poles and lines, Judge Sweigert questioned the power of Interior to authorize a transmission line in Sequoia National Park without obtaining Congressional approval.

Section 45(c), which applies specifically to Sequoia National Park, reads in relevant part as follows:

> " . . . *Provided,* That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress."

Judge Sweigert observed that 16 U.S.C. §5 is a general statute authorizing heads of departments with jurisdiction over public lands to grant easements for transmission lines. He noted that in the case of national parks, the statute requires a finding that such a line is compatible with the public interest (A. 195). He found that Section 45(c) with specific application to Sequoia National Park prevails over the general Section 5 (A. 194-195).

Another section dealing with the power of the Secretary is 16 U.S.C. 79 under which he may grant *revocable* rights of way for electrical poles and lines. This power is not relevant to the present situation since the transmission line would involve a large investment and would require a representation, express or implied, that the line could be maintained as long as power is needed at Mineral King.

In its attempt to avoid the plain language of Section 45(c), the Ninth Circuit referred to the Secretary's general power under 16 U.S.C. §5 and found that he may authorize a transmission line in the Park without Congressional action because it was unlikely that it was the "intention to require an act of Congress for each electrical line within the park . . ." (A. 232).

The Ninth Circuit did not read 16 U.S.C. §45(c) carefully. That section requires Congressional authorization not for every *electrical* line but only for that much narrower category of high voltage *transmission* lines.

The Ninth Circuit also accepted the proposition that Section 45(c) "was intended to apply only to the construction and development of hydroelectric projects and related facilities including power lines." (A. 232). To read 16 U.S.C. §45(c) is to reject this interpretation. It says that

> " . . . no permit, license, lease, or authorization for . . . transmission lines . . . *or* for the development, transmission, or utilization of power within the limits of said park . . . shall be granted or made without specfic authority of Congress." (Emphasis added).

If the intention suggested by the Ninth Circuit were correct, the phrase "transmission lines" could have been omitted.

Section 45(c) applies to any line intended to transmit power across Sequoia National Park for ultimate distribution elsewhere. As Judge Sweigert noted, it makes no "distinction between electric projects within or without the Park." (A. 195).

The section requires Congressional approval whether the transmission line is intended to serve a park purpose or not. While juxtaposed with another proviso concerning the power of the Secretary of the Interior, the section was not aimed at any particular agency of government to the exclusion of others. Instead, it was a general injunction.

The effect of the statute is that a transmission line to serve a park purpose in Sequoia National Park nevertheless would require Congressional approval. However, in addition, 16 U.S.C. §1 bars the Secretary from approving a line across *any* national park where, as in this case, that line was not intended to serve a park purpose. Both 16 U.S.C. §5 and 16 U.S.C. §79 are subject to this fundamental limitation. When the line would cross Sequoia National Park, they also are subject to 16 U.S.C. §45(c).

Judge Sweigert's opinion was in accord with the clear expression of Congress and it was error for the Ninth Circuit to rule otherwise.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Ninth Circuit should be reversed.

May, 1971.

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(Brief Appendix Follows)

BRIEF APPENDIX

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, A ticle IV, Section 3, Clause 2. The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Administrative Procedure Act (as amended Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 381; 5 U.S.C. §§ 551, 553, 701-706):

5 U.S.C. § 551. Definitions:

For the purpose of this subchapter—

* * *

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

* * *

5 U.S.C. § 553:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons

subject thereto are named and [redacted] personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

• • •

5 U.S.C. §701:

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b) (2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 702:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. § 703:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 U.S.C. § 704:

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 705:

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S.C. § 706:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or

otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

16 U.S.C. § 1:

There is created in the Department of the Interior a service to be called the National Park Service, which shall be under the charge of a director. The Secretary of the Interior shall appoint the director, and there shall also be in said service such subordinate officers, clerks, and employees as may be appropriated for by Congress. The service thus established shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified, except such as are under the jurisdiction of the Secretary of the Army, as provided by law, by such means and measures as conform to the fundamental purpose of the said parks, monuments and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations. 39 Stat. 535, 48 Stat. 389.

16 U.S.C. § 5:

The head of the department having jurisdiction over the lands be, and he hereby is, authorized and

empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-way herein granted for any one or more of the purposes herein named: *Provided,* That such right-of-way shall be allowed within or through any national park or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all or any part of such right-of-way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

Any citizen, association, or corporation of the United States to whom there has been issued a permit, prior to March 4, 1911, for any of the purposes specified herein under any law existing at that date, may obtain the benefit of this section upon the same terms and conditions as shall be required of citizens, associations, or corporations making application

under the provisions of this section subsequent to said date. 36 Stat. 1253; 66 Stat. 95.

16 U.S.C. § 8:

The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior. 43 Stat. 90.

16 U.S.C. § 41:

The tract of land in the State of California known and described as township numbered 18 south, of range numbered 30 east, also township 18 south, range 31 east; and sections 31, 32, 33, and 34, township 17 south, range 30 east, all east of Mount Diablo meridian, is reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park, or pleasure ground, for the benefit and enjoyment of the people; and all persons who shall locate or settle upon, or occupy the same or any part thereof except as hereinafter provided [in section 43 of this title], shall be considered trespassers and removed therefrom. 26 Stat. 478.

16 U.S.C. § 45c:

Nothing herein contained [in section 45a or 45b of this title] shall affect any valid existing claim, location, or entry heretofore established [prior to July 3, 1926], under the land laws of the United States, whether for homestead, mineral, right-of-way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the

full use and enjoyment of his land: *Provided,* That under rules and regulations to be prescribed by him the Secretary of the Interior may issue permits to any bona fide claimant, entryman, landowner, or lessee of land within the boundaries herein established [by sections 45a-45e of this title] to secure timber for use on and for the improvement of his land; and he shall also have authority to issue, under rules and regulations to be prescribed by him, grazing permits and authorize the grazing of livestock on the lands within said park at fees not to exceed those charged by the Forest Service on adjacent areas, so long as such timber cutting and grazing are not detrimental to the primary purpose for which such park is created: *Provided,* That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress. 44 Stat. 820.

16 U.S.C. § 79:

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufactur-

ing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted under this section for any one or more of the purposes herein named: *Provided,* That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all permits given under this section for telegraph and telephone purposes shall be subject to the provision of sections 1-6, and 8 of Title 47, regulating rights-of-way for telegraph companies over the public domain: *And provided further,* That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park. 31 Stat. 790; 54 Stat. 43.

16 U.S.C. § 497:

The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to

permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; (b) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding five acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining summer homes and stores; (c) to permit the use and occupancy of suitable areas of land within the national forest, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining buildings, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests; (d) to permit any State or political subdivision thereof, or any public or nonprofit agency, to use and occupy suitable areas of land within the national forests not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining any buildings, structures, or facilities necessary or desirable for education or for any public use or in connection with any public activity. The authority provided by this section shall be exercised in such mannner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests. 70 Stat. 708.

16 U.S.C. § 528:

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528-531 of this title are declared to be supplemental

to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests. 74 Stat. 215.

16 U.S.C. § 529:

The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528-531 of this title. 74 Stat. 215.

16 U.S.C. § 530:

In the effectuation of sections 528-531 of this title the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests. 74 Stat. 215.

16 U.S.C. § 531:

As used in sections 528-531 of this title, the followings terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the

national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land. 74 Stat. 215.

16 U.S.C. § 551:

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one [provisions of section 471 of this title], and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of sections 473-482 of this title or such rules and

regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States commissioner specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in Title 18 United States Code, Section 3401, subsections (b), (c), (d), and (e), as amended. 30 Stat. 35; 76 Stat. 1157; 78 Stat. 745.

16 U.S.C. § 688:

All parts of township 17 south, ranges 31 and 32 east, and township 18 south, range 31 east, Mount Diablo base and meridian, which are north of the hydrographic divide passing through Farewell Gap, and which are not added to and made part of the Sequoia National Park by the provisions of this Act [sections 688-689d of this title], are hereby designated as the Sequoia National Game Refuge, and the hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of the United States within the limits of said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture: *Provided,* That it is the purpose of this section to protect from trespass the public lands of the United States and the game animals which may be thereon, and not to interfere with the operation of the local game laws as affecting private or State lands; *Provided further,* That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under

and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established. 62 Stat. 861.

23 U.S.C. § 138:

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use. 80 Stat. 771; 82 Stat. 823.

48 U.S.C. § 341:

The Secretary of Agriculture, in conformity with regulations prescribed by him, may permit the use and occupancy of national-forest lands in Alaska for pur-

poses of residence, recreation, public convenience, education, industry, agriculture, and commerce, not incompatible with the best use and management of the national forests, for such periods as may be warranted but not exceeding thirty years and of such areas as may be necessary but not exceeding eighty acres, and after such permits have been issued and so long as they continue in full force and effect the lands therein described shall not be subject to location, entry, or appropriation, under the public land laws or mining laws, or to disposition under the mineral leasing laws: *Provided,* That nothing contained in this section shall prevent the said Secretary from canceling, revoking, or otherwise terminating a permit so issued upon proof of a breach of its terms and conditions or for other just cause. 62 Stat. 100.

49 U.S.C. § 1653 (f):

It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site

of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife, and waterfowl refuge, or historic site resulting from such use. 80 Stat. 933; 82 Stat. 824.

Forest Service Manual

2711.1 *Annual Permits.* Annual permits:

* * *

3. Are issued on the Annual Special-Use Permit, Form 2700-4. The authorizing legislation will be cited on the permit form. Annual permits are subject to revision at any time because of change in laws or regulations. The Forest Service may amend the permit at any time, when it is in the public interest to do so, but the normal practice is to make such changes effective January 1, or the beginning of the payment period. Forest officers should discuss contemplated changes with the permittee at least 90 days prior to permit amendment.

* * *

5. Are generally authorized for use of short duration. They will be limited to the time actually needed for exercising the use privileges. Except for certain road permits (FSM 2730), a suitable termination clause will be included (FSM 2780). Existing permits will be so modified as time allows.

(October 1968)

2716.3 *Revocations.* In all cases of revocation, the permittee is entitled to adequate notice and the reasons for the action. If a breach is involved, he will be given an

opportunity to cure the breach before the revocation becomes final. Usually not more than 90 days should be granted to cure the breach. A reasonable period must be allowed for removal of improvements (FSM 2716.4).

The proposed revocation action must be reviewed by the attorney in charge.

1. Term permits may be revoked only:

a. When there has been a breach of the conditions of the permit and the permittee has been given an opportunity to show cause why the permit should not be revoked and has failed to do so.

b. When the land is required for higher public use. Action under this authority shall be fully explained to the permittee (applicable for term permits, as provided by clause 16 of form 2700-5 and 2700-15 and clause 23 of form 2700-17, thereof). This clause will be invoked only in cases when the land is needed for public purposes. Justification procedures to be followed in revoking a recreation residence permit for a higher public use are listed in FSM 2721.22f. Similar procedure will be followed for other types of uses.

c. By an officer superior in rank to the issuing officer.

2. An annual permit can be revoked for a violation of the terms or at the discretion of the Forest Service. Forest Service discretion to revoke will normally be exercised only:

a. When the land is needed for more important public purposes.

b. When the present use has become unsatisfactory or undesirable.

(October 1968)

The Secretary of the Interior's Rules for Roadbuilding in National Parks, 34 Fed. Reg. 19 (F.R. Doc. 69-1177; Filed Jan. 28, 1969), read in relevant part as follows:

Office of the Secretary

ROADBUILDING IN NATIONAL PARKS

Adoption of Procedures

The procedures adopted herein are designed to ensure effective public participation in determining the location and design of major road projects in the National Park System administered by the Department of Interior. In addition, they require that full consideration be given to the potential social, economic, and environmental effects of each proposed project.

The following procedures are adopted, effective immediately, and apply to all major road projects in the National Park System administered by the Department of Interior.

(1) Coordination required. When the National Park Service begins considering the development or improvement of a major road it shall solicit the views of those Federal, State, and local agencies that it believes might be interested or affected by the development or improvement. A mailing list will be maintained upon which any such agency may enroll, upon request, to receive notice of projects in any area specified by that agency.

(2) Public hearings required. a. Both a corridor public hearing and a design public hearing will be held, or an opportunity afforded for those hearings, with respect to each major road project that:

(1) Is on a new location; or

(2) Would have a substantial social, economic, or environmental effect.

b. A single combined corridor and design public hearing will be held, or the opportunity for such a hearing afforded, on all other projects before a location is approved, except as provided in subparagraph 2.c below.

c. Hearings are not held on a project that is solely for such improvement as resurfacing, widening existing lanes, adding auxiliary lanes, replacing existing grade separation structures, and installing traffic control devices or similar improvements, if the project would not have a substantial social, economic, or environmental effect.

d. An opportunity for another public hearing will be afforded in any case where proposed locations or designs are so changed from those presented, in the notices specified below or at a public hearing, as to have a substantially different social, economic, or environmental effect.

* * *

(7) Definitions. a. A "corridor public hearing" is a public hearing that:

(1) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the need for and the general location of, a major road; and

(2) Provides a public forum that affords a full opportunity for presenting views on each of the proposed alternative locations, and the social, economic, and environmental effects of those alternate locations.

b. A "design public hearing" is a public hearing that:

(1) Is held after the major road location has been approved, but before design approval;

(2) Is held to ensure that an opportunity is afforded for effective participation by interested

persons in the process of determining the specific location and major design features of a major road; and

(3) Provides a public forum that affords a full opportunity for presenting views on alternative design features, including the social, economic, environmental, and other effects of alternate designs.

c. "Social, economic, and environmental effects" means the direct and indirect benefits or losses such as:

(1) Public health, safety and welfare.

(2) Conservation, including erosion, sedimentation, wildlife and general ecology of the area.

(3) Use of recreational areas and parks.

(4) Natural and historic landmarks.

(5) Aesthetics.

(6) Noise, and air and water pollution.

(7) Fire protection.

(8) Fast, safe, and efficient transportation.

(9) Engineering, right-of-way, and construction costs of the project and related facilities.

(10) Maintenance and operating costs of the project and related facilities.

(11) Operation and use of existing road facilities and other transportation facilities during construction and after completion.

d. "Major roads" means the main entrance roads and arteries of the park circulation system.

This list of effects is not meant to be exclusive, nor does it mean that each effect considered will be given equal weight in making a determination upon a particular major road location or design.

Issued in Washington, D.C., on January 18, 1969.

STEWART L. UDALL,
Secretary of Interior

The Secretary of the Interior's notice of revocation of Rules for Roadbuilding in National Parks, 34 Fed. Reg. 6985 (F.R. Doc. 69-4993, Filed, April 25, 1969), reads in its entirety as follows:

Office of the Secretary

ROADBUILDING IN NATIONAL PARKS

Revocation of Procedures

Notice is hereby given that the procedures adopted on January 18, 1969, and published in the FEDERAL REGISTER on January 29, 1969, 34 F.R. 1405, regarding the location and design of major road projects in the National Park System administered by the Department of the Interior are revoked, effective immediately.

Issued in Washington, D.C., on April 21, 1969.

WALTER J. HICKEL,
Secretary of the Interior.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 939

Sierra Club,

Petitioner,

v.

Rogers C.B. Morton, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL ENVIRONMENTAL LAW SOCIETY AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The National Environmental Law Society is a nonprofit corporation organized under the Laws of the State of California with national headquarters at Stanford University School of Law. The Society is composed of student chapters functioning in fifty-two major law schools throughout the United States. Chapters are in such schools as Boston University, Cornell, Fordham, George Washington, Harvard, Hastings, Rutgers, St. John's, Stanford, Syracuse, the Universities of: Arkansas, California (Berkeley [Boalt Hall], Davis and Los Angeles campuses), Chicago, Colorado, Florida, Illinois, Maryland, Michigan, Oregon, Pennsylvania, Santa Clara, Texas, Utah, Virginia, Washington, and Wisconsin, Vanderbilt and Yale Universities and many others.

The primary purposes of the National Environmental Law Society are to promote the study of legal skills and disciplines related to the attainment of high environmental quality and the

conservation of resources. This is accomplished by encouraging law schools to include the study of environmental law within their curriculum, by disseminating information regarding environmental law, by aiding through research and volunteer effort those legal actions which truly seek to protect environmental quality. The aim of the Society is not to prepare future and present attorneys for vexatious litigation, but to instill a knowledge and awareness of the need to protect, preserve and restore our Nation's environmental and natural resources (both animate and inanimate) for all people recognizing that we hold America in trust for future generations.

The two individuals who prepared this brief Michael Bauernfeind and Peter Heiser, Jr., are students at the University of Santa Clara School of Law who share the Society's aims and purposes.

We address ourselves solely to the issue of standing because we feel it is particularly important that the United States Supreme Court announce a rule of standing favorable to environmental litigants asserting the public interest. We reserve discussion of the merits of this case to the parties directly involved.

This brief is filed with the written consent of all parties pursuant to United States Supreme Court Rule 42(2).

SUMMARY OF ARGUMENT

The law of standing has caused confusion in the federal court system for many years. Though in past years only those litigants who had suffered a true economic injury were granted standing to have their claims adjudicated, in recent years many courts throughout the federal system, including this United States Supreme Court, have recognized that economic loss is *not* the only measure of injury. Very real loss to the entire nation occurs when natural resources are rapaciously consumed, and when our environment is choked by man's waste, or when a wildlife species faces extinction – yet these losses, these "social costs," are incapable of expression in finite dollar and cent terms. Those who seek to protect and preserve our natural and environmental heritage for present and future generations by

petitioning our courts for a redress of grievances when governmental agency action adversely affects our environment are sometimes told that they have no standing to litigate their claims – they allege no conceivable injury to themselves. When this happens, and a governmental agency is allowed to pursue an environmentally detrimental course of action, rather than pursuing another less deleterious course of action or taking no action at all, we all suffer the loss in very real – yet non-economic – terms.

Most Acts of Congress which relate to the use of our lands, waters and the like express a national congressional purpose and intent to preserve and care for our bounty if at all possible. Too often, the cold, abstract figures representative of competing economic interests cause federal agencies to give too little consideration to this national policy. Those persons economically injured by agency action have ready access to the federal courts if Congress has expressed in some statute the general intent to protect their particular interests, but those representing the non-economic interest of the public in our environment often fail to pass the standing barrier.

Increasing national concern over environmental quality and natural resources and wildlife, perhaps prompted in part by a history of litigation by concerned environmentalists, is evidenced in many new Acts of Congress, some specifically enacted to protect our Nation's natural heritage. In spite of this, the right of a litigant to assert non-economic injury to the environment in behalf of the general public is not recognized in some federal courts – and specifically is not recognized by the United States Court of Appeals for the Ninth Circuit. In this troubled era, where many with grievances have taken to the streets, those who seek to protect the public interest in our environment have sought help from a more appropriate forum, the courts. It is imperative that this Court firmly establish a right of standing in the federal courts for those who litigate in the public's behalf, seeking not money, but justice.

At no other time has a case on standing been heard by this Court where the petitioner asserted such a purely non-economic injury as the Sierra Club does now. Because of this, the Court has an opportunity to make a clear pronouncement of law elim-

inating forever the standing barrier for environmentalists who shoulder the burdensome costs of litigation for us all.

On behalf of this generation and those of future generations, we heartily urge the United States Supreme Court to use this opportunity to strike down the standing barrier presently faced by the environmental litigant.

I. SOUND PUBLIC POLICY AS WELL AS SPECIFIC CONGRESSIONAL AND EXECUTIVE EXPRESSIONS OF NATIONAL ENVIRONMENTAL POLICY REQUIRE THAT PERSONS INTERESTED IN ENVIRONMENTAL PROTECTION BE GRANTED STANDING TO CHALLENGE AGENCY ACTION ALLEGEDLY DELETERIOUS TO THE ENVIRONMENT.

Though the study of the relationships between organisms and the environment, ecology, has been a recognized scientific discipline since its introduction over one hundred years ago by Vermont lawyer, George Perkins Marsh, we have waited until recent years to heed its teachings. As we look at this Nation's polluted waters, eroded and stripped soil, endangered and extinct wildlife species, and the profligate consumption of our natural resources, we must wonder if man has not waited too long in recognizing the need to *apply* the science of ecology.

George Marsh expressed the belief that man was trapped in his environment and that this trap would ultimately lead to civilization's destruction.[1] Only now, as our natural resources and raw land disappear and environmental pollution chokes much of this Country, are Marsh's warnings beginning to cause serious national concern. Recently, noted scientist, Clarence C. Gordon, of the University of Montana, stated that this "nation just hasn't the time to wait to correct these environmental insults."[2]

Because Yellowstone was threatened with exploitation and commercialization, Cornelius Hedger, a Montana judge, and other far sighted conservationists sought to establish our first National

1. Russell, *The Vermont Prophet: George Perkins Marsh*, HORIZON, Summer 1968, at 16.

2. Gordon, *Can Law Reclaim Man's Environment?*, TRIAL, August/September 1969, at 10.

Park, the first national park in the world, in 1872.[3] Since then the concept of preserving our national heritage in trust for posterity has been so well accepted that there are now many millions of acres under either National Forest Service or National Park Service control. Since the heads of the Department of Agriculture and Department of Interior who, respectively, control these two Services are cabinet appointees who change with each new administration and its policies, there is a need to assure that there is a continuing policy to preserve and protect the lands held in public trust. The practical exigiences of any given administration may act in such a way that these trusts are compromised. In the case at bar, great political pressures have been exerted by the citizens of Tulare County, citizens of the Los Angeles area and those who would benefit from the commercial development of Mineral King. The Forest Service itself stands to realize substantial annual fees from the developed projects.[4] Thus, it should be apparent that the best guardian of the public right and public interest is not, exclusively, a government agency, but, rather, the vigilance and concern of the American public in demanding that congressional expressions of national policy be followed. With the protection and restoration of the environment in mind, many conservation and environment -minded individuals and groups have taken on the task of trying to save our environment. Realizing the limitations of educational and legislative processes in preventing specific destruction of our resources, environmentalists have sought the aid of a responsive judiciary in requiring governmental agencies to give proper effect to sound environmental policy already enacted into law. Additional enlightened social legislation concerned with environmental protection has followed this wave of litigation. But, in spite of this, almost every identifiable social or economic interest group, as well as most federal agencies, is

3. 16 ENCYCLOPEAEDIA BRITANNICA, *National Parks and Reserves* 66 (1968).

4. Sims, *Mineral King: Battleground On Use of Public Lands,* Los Angeles Herald Examiner, *editorial,* 7th Sept. 1969.

actively engaged in the destruction of the environment.[5] As Professor Arnold Reitze, Jr., points out, many federal agencies work at cross purposes:

> The Department of Agriculture has paid North Dakota farmers to drain land, while the Department of the Interior spends money to create and protect such wet lands for wild fowl breeding; the Department of Agriculture pays to remove lands from agricultural production, while the Bureau of Reclamation spends large sums of money to create agricultural lands; the Army Corps of Engineers dredges harbors in such a manner as to increase the pollution problems the Federal Water Pollution Control Administration is attempting to abate. Examples of these inconsistent government activities are legion, and they are largely the result of numerous agencies that represent specialized economic interests.[6]

Congress, recently, has recognized the problem of inadequate consideration by federal, as well as state and local, agencies of the environmental consequences of their actions and has passed several Acts designed to promote preservation of our natural resources.[7] Even after this congressional expression of national policy, many agency actions require a balancing of opposing economic and social interests. When an agency does

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5. See generally: S. UDALL, THE QUIET CRISIS (1963) HERFINDAHL AND KNEESE, QUALITY OF THE ENVIRONMENT 35, 65 (1965); STILL, THE DIRTY ANIMAL 239 (1967); CAUDILL, NIGHT COMES TO THE CUMBERLANDS (1962); LIFE, 12th January 1968 at 54; W. DOUGLAS, A WILDERNESS BILL OF RIGHTS 147 (1965); The New York Times, 3rd January 1968 at 96; U. S. DEPARTMENT OF THE INTERIOR, WASTES FROM WATERCRAFT, S. Doc. No. 48, 90th. Cong., 1st Sess. 3 (1967).

6. Reitze, *Pollution Control: Why Has it Failed?*, 55 A. B. A. J. 923, 926 (1967).

7. Among them: Environmental Education Act, 20 U.S.C. § 1531; Air Quality Act of 1967, 42 U.S.C. § 1857 *et seq.*; National Environmental Policy Act, 42 U.S.C. §§4321–4347; Environmental Quality Improvement Act of 1970, 42 U.S.C. §§4372–4374.

not consider both of the opposing interests, those "aggrieved" by such action should have the right to judicial review.

As stated in *Scenic Hudson* (354 F.2d at 624), a "Commission's * * * proceedings must include as a basic concern the preservation of natural beauty and of national historic shrines, keeping in mind that, in our affluent society, the cost of a project is only one of several factors to be considered." There is no technical formula by which we may weigh the opposing interests. Just as a court may readily consider the wilderness value of a national forest as opposed to the dollar revenue to be realized from the cutting of trees (as in *Parker v. U.S., infra*), so may courts decide whether construction of a major roadway is in accordance with "the national policy that special efforts should be made to preserve the natural beauty of the countryside." [Department of Transportation Act, 49 U.S.C. §1651(b)(2)]. Because the legislature acts upon projected problems of general concern, what may not be apparent to the legislature when the whole forest is viewed may be of vital concern when the judiciary acts specifically and empirically in an adversary setting to examine a single tree.

Professor Davis regards the comparative expertise of administrative agencies and courts as follows:

> The courts, not the agencies, are comparatively the experts in * * * constitutional law, common law, ethics, overall philosophy of law and government, judge-made law developed through statutory interpretation * * * [and] *most analysis of legislative history.* [Emphasis added.][8]

Where but in the courts will we gain the benefit of such enlightened reasoning as emanated from this court in the *High Mountain Sheep* case [*Udall v. FPC*, 387 U.S. 428 (1967)] to the effect that in any case involving a project which proposes elimination of or encroachment upon a significant resource, one relevant factor which must be considered is whether the project

8. 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 30.09 at 241 (1958).

should be undertaken at all, in addition to consideration of proposed alternative dispositions of the resource:

> The test is whether the project will be in the public interest and that determination can be made only after an exploration of all issues relevant to the "public interest," including * * * the public interest in preserving reaches of wild rivers and wilderness areas, the preservation of anadromous fish for commercial and recreational purposes, and the protection of wildlife. 387 U.S. at 450.

Where but in the courts will be gain from a liberal interpretation of the legislative history of a congressional statute such as was rendered by this Court in the case of *United States v. Standard Oil Co.*,384 U.S. 224 (1966). Even a thorough reading of the Senate Report concerning the history of Section 13 of the Rivers and Harbors Act of 1899 (33 U.S.C. §407) reveals that the Senate was not concerned with the pollutant effect of waste discharges, but only with their effect upon navigibility.[9] The *Standard Oil* decision shows the willingness of the Court to interpret statutory history in the light of sound, current public policy and necessity. Thus, the Court cited Senate remarks on "the discharge of sawmill waste into streams" and injury to channels by "deposits of ballast, steam-boat ashes, oysters, and rubbish from passing vessels" (384 U.S. at 228-229) to imply a congressional concern with pollution.

Because of the recent passage of several congressional acts and issuance of Executive Orders designed to protect the environment, particularly the National Environmental Policy Act (NEPA) [42 U.S.C. §§4321-4347] and Executive Order 11514 pursuant thereto,[10] the Court could base a decision recognizing standing for environmentalists on these current clear expressions of national policy. But, because the most demanding of these Acts, NEPA, merely requires *preparation* of environmental

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9. See: S. Rep. No. 244, 50th Cong., 1st Sess. 1-2 (1887).

10. EXECUTIVE ORDER 11514, *Protection and Enhancement of Environmental Quality*, 35 Fed. Register 4247, 7th. March 1970. See also other environmental statues reported in footnote 7, *supra*.

impact statements by federal agencies undertaking "major" actions [42 U.S.C.§4332(c)] and not an agency decision *necessarily* guided by the findings therein, we urge this Court to express the law of standing on more traditional grounds for those who seek to protect our natural resources through litigation.

There are many instances where challenged agency action affects or economically injures no single person or group directly, but adversely affects the public interest generally because of an irreversible loss of a natural resource or wildlife species or other injury to the environment. There are many issues, such as a suit to protect an endangered species, or protection of a wilderness area, or preservation of a high mountain lake or stream, to name but a few, which could not be judicially challenged by a "traditional plaintiff" -for none exists. No individual suffers a true "economic loss" in such a case, but we all suffer from the environmental loss. If a group or individual representing the public's interest in the environment possesses the requisite "interest and adversity" to maintain a costly lawsuit in the federal courts, should he not be deemed sufficiently "aggrieved" to have standing to maintain that action? When an individual is adversely affected by governmental action, he must first exhaust whatever administrative remedies are available to him. Once these have been exhausted, there are realistically two forms of action left; civil disobedience or relief in the courts. When those aggrieved are denied standing even to present their grievances before the courts, the only other alternative is one which is repugnant to a well ordered society. We submit that the legitimate channel for protest, the courts, should be open to those asserting the public interest. Another alternative to allowing a challenge of agency action by such litigants is to allow a significant number of grievances to go judicially unnoticed for want of a person "injured" in the traditional sense who might be willing to bring the action in his own behalf. Some would raise the cry that standing for environmental litigants would "flood the courts" with their litigation. To them we reply with this Court's own words in the *Flast v. Cohen* decision, 392 U.S. 83, 93-94 (1968) and the concurring opinion of Justice Douglas at 112:

> There need be no inundation of the federal courts if [such] suits are allowed. There is a wide judicial discretion that can usually distinguish between the frivolous question and the substantial question, between cases ripe for decision and cases that need prior administrative processing and the like.

In conclusion, we submit that when The Bible, speaking of Creation [2 *Genesis* §26 (Wilderman Co. ed 1911)], says: "Let us make man to our image and likeness: and let him have dominion over the fishes of the sea and the fowls of the air, and the beasts, and the whole earth, and every creeping creature that moveth upon the earth," this does not give man the right to destroy the earth and its creatures, unchallenged. Recent heightened concern over our environment has been labeled a fad. If so, it may well be the last fad.

II. THE BACKGROUND AND DEVELOPMENT OF THE LAW REGARDING STANDING REVEAL THAT, THOUGH THE CONCEPT IS STILL AMORPHOUS, ITS APPLICATION IS BECOMING LESS RESTRICTIVE.

Standing has become one of the more perplexing areas of the federal law. As a general rule, one who asserts violation of a constitutional or statutory right must demonstrate that he has suffered some direct and immediate injury as a result of the challenged action. Without these required allegations, federal courts will rule that the claimant has no standing and refuse to decide the issues.

This requirement of standing often operates as a self-imposed federal court rule of judicial restraint to avoid deciding "unimportant" issues, while, at other times, it is also said to be a part of the Constitution's article III, §2 limitation of federal judicial power to "cases and controversies." Unfortunately, it is not often easy to distinguish between these two uses of the standing concept.

Historically, taxpayers have not had standing to challenge allegedly unconstitutional federal expenditures.

In *Frothingham v. Mellon*, 263 U.S. 447 (1923), the U.S. Supreme Court ruled that taxpayer interest in such matters is too remote, indeterminate, and minute, and that injury suffered is suffered in common with people in general so that an individual taxpayer should have no standing to sue. In this instance, standing was denied as a matter of self-imposed judicial restraint.

More recently, the Court ruled in *Flast v. Cohen* 392 U. S. 83 (1968), that a federal taxpayer may challenge a particular federal expenditure if he alleges that it is part of a spending program which exceeds *specific* constitutional limitations. Perhaps the Court was also aware of the fact that, on the basis of 1923 income taxes, the interest of any one taxpayer or small group of taxpayers was so minute that it would not constitute a basis for standing, whereas, given an individual's present tax burden, a federal taxpayer's interest in any given program may still not be "significant," but is definitely not "minute."[11] Perhaps this decision was a small recognition of the substantial effect of federal action on the life of an individual. Although the issue litigated was quite specialized, the *Flast* decision has contributed greatly to a general liberalization of the law of standing.

The next year, the U. S. Supreme Court reconsidered the problem of standing in *Jenkins v. McKeithen*, 395 U. S. 411 (1969), and noted that the concept of standing "is surrounded with the same complexities and vagaries that inhere in [the concept of] justiciability" in general. *Id.* at 423. The Court then reiterated the basic, indispensible requirement for standing that was set forth in *Baker v. Carr*, 369 U. S. 186 (1962), that the party seeking relief allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* at 204; *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969). The Court, in *Jenkins*, went on to state that "[i]n this sense, the concept of standing focuses on the party seeking relief, rather than the precise nature of the relief sought." 395 U.S. at 423.

11. Karabus, *The Flast Decision on Standing of Federal Taxpayers to Challenge Governmental Action: Mirage or Breach in the Dike?*, 43 N. DAK. L. REV., 353, 356 (1969).

Most recently, the U. S. Supreme Court again faced the problem of standing in two cases decided the same day, *Association of Data Processing Service Organizations v. Camp*, 397 U. S. 150 (1970), and *Barlow v. Collins*, 397 U. S. 159 (1970), and promulgated a new two-step test for standing. The first step requires a determination of "whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise." 379 U. S. at 152. If such injury is alleged, the Court then inquires "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U. S. at 153 though Justice Brennan, joined by Justice White, argued vigorously against the "zone of interest" requirement of the second, nonconstitutional, step, they were unable to convince the majority, and the second "test" remains as a confusing portion of the standing barrier. 397 U. S. at 167 *et seq.* Professor Louis L. Jaffe, commenting recently on the *Data Processing* and *Barlow* cases[12] states that the most significant development in the area of standing, and in the whole field of administrative law, is that individual and organizational plaintiffs whose concern is not specifically economic or who represent citizen interests in various forms have gained the right to litigate. He feels that this development has introduced new life into the administrative process by compelling it to respond to previously underrepresented forces and values. 84 HARV. L. REV. at 633.

12. Jaffe, *Standing Again*, 84 HARV. L. REV. 633 (1971). Though Professor Jaffe agrees that the second part of the new two-step test is an unnecessary and inappropriate part of the requirement for standing, he feels that it may serve a valid purpose by placing control of the legal situation within the descretion of federal judges to grant jurisdiction of any particular suit. With this conclusion, we respectfully disagree. We feel there is a need for a rule of standing which will virtually *guarantee* the right of plaintiffs representing certain non-economic public interests to challenge in federal courts governmental action which disregards and injures those interests. The matter of jurisdiction should not be allowed to be used as a subterfuge under which standing is denied. The two considerations are separate and distinct.

Professor Davis summed up the standing problem when he stated:

> A plaintiff who seeks to challenge governmental action has standing if a legal right of the plaintiff is at stake. When a legal right of the plaintiff is not at stake, a plaintiff sometimes has standing and sometimes lacks standing. Circular reasoning is very common, for one of the questions asked in order to determine whether a plaintiff has standing is whether a plaintiff has a legal right, but the question whether a plaintiff has a legal right is the final conclusion, for if the plaintiff has standing his interest is a legally-protected interest, and that is what is meant by a legal right.
>
> 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §22.04 at 217 (1958).

It is no wonder that standing is regarded as one of the most amorphous concepts in the field of law. New U. S. Supreme Court decision which seem to promulgate new rules and guidelines are more useful in clarification of earlier decisions than in providing substantive guidelines for prospective litigants. Even the U. S. Supreme Court refers to the standing concept as a "complicated specialty of federal jurisdiction," *U. S. ex rel. Chapman v. FPC*, 345 U. S. 153, 156 (1953). The opinion of the court (*per* Judge Tamm) in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D. C. Cir. 1970), after providing a fine review of the problem of standing, declares that when Congress lays down guidelines to be used in carrying out its mandate in some specific area, a procedure should exist whereby those injured by arbitrary and capricious actions of some governmental agency official who has ignored those guidelines may "vindicate their very real interests, while at the same time furthering the public interest." 424 F.2d at 864. With this contention, we heartily concur! Anyone who must face the standing barrier would agree that such a procedure *should*

exist. All too often, federal courts find that no such procedure exists and, therefore, deny standing. Certainly, the environmental litigant is often forced to spend large sums merely to adjudicate the threshold issue of standing, sometimes unsuccessfully, before he is allowed to pursue his case on the merits. In this era of increasing environmental degradation and a heightened national awareness of the need for environmental protection, restoration and control, the fact that environmental litigants may not be allowed to argue the merits of their contentions because of an inability to pass the standing barrier is indeed unfortunate. One of the problems with the present two part test for standing is that in order to determine whether a plaintiff comes within the "zone of interest of a relevant statute," a court must look to the merits of the case to see if there is a Congressional intent expressed in a particular statute to protect the interest plaintiff asserts. In essence, the merits are preliminarily decided without the petitioner being allowed to present his case. Justice Brennan's premonition, expressed in his *Barlow* dissent, that the "Court's approach does little to guard against the possibility that judges will use standing to slam the door against plaintiff's who are entitled to full consideration of their claims on the merits," (397 U.S. note 19 at 165), did in fact occur in the 9th Circuit's decision of the case presently at bar.

A. Standing Is Now Granted To Many Litigants Who Assert Non-economic Interests, Particularly Those Who Assert The Public's Interest In Environmental Protection.[13]

Regarding the "zone of interest" concept of the *Data Processing* case, the U.S. Supreme Court declared:

> That interest may, at times reflect "aesthetic, conservational, and recreational" as well as economic values. *Scenic Hudson Preservation Conf. v. Federal Power Commission*, 354 F.2d 608, 616 [(2d Cir. 1965)]; *United Church of Christ v. FCC*, 359 F.2d 994, 1000-1006 [(D.C. Cir. 1966)]. * * *

13. For a comprehensive discussion of problems affecting environmental litigants see: Heiser, *Standing and Sovereign Immunity: Hurdles for Environmental Litigants*, 12 SANTA CLARA LAWYER ___ (1971).

> We mention these non-economic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here." 397 U.S. at 154.

The Court further states that "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." 397 U.S. at 154. This is a rather authoritative pronouncement, through dicta, by the Court, but the question remains: What constitutes a "class of people who may protest?"

Examining, first, the *Scenic Hudson* case, cited by the Court as supporting the right of litigants reflecting aesthetic, conservational, and recreational values to be in court, one finds that the two conservation groups which organized Scenic Hudson had no property interest in the area. Aside from the claim that one of the groups maintained trailways in the area of Storm King Mountain, some of which would have been inundated by the project, the environmental groups represented no economic interest, yet the court granted them standing in their own behalf – not merely because three towns also joined in the suit. To assure proper consideration by the FPC of the non-economic interests of the conservation groups in preserving an rear referred to as one of the finest pieces of river scenery in the world, the court held that "those who by their activities and conduct have exhibited a *special interest* in such areas, must be held to be included in the class of 'aggrieved' parties under § 313 (b) [of the Federal Power Act, 16 U.S.C. § 825 (b)]." 354 F.2d at 616. [Emphasis added.]

The next case referred to by the Court in its *Data Processing* decision as exemplifying the fact that standing may stem from non-economic values is *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). In this case, listeners and would-be listeners of a radio station, who alleged no economic injury, petitioned the court for the right to intervene in a license renewal proceeding before the FCC. The court's well reasoned opinion per Judge (now Chief Justice) Burger held that the listeners

were responsible members of the consuming public who in some sense "consume" or would "consume" the product of the broadcast industry and, thus, had standing to represent the public interest. Reasoning that the "concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience." *Id.* at 1002. Who but the general public, and in particular a group with such an obvious concern as the Sierra Club, are "consumers" of our national forests and other natural resources? The 9th Circuit, obviously, does not apply such a test. When addressing itself to the question of what particular group or individual should be granted standing to represent the public interest in court or before a federal agency, the court stated in *United Church of Christ:*

> The responsible groups eligible to intervene cannot here be enumerated or categorized specifically; such community organizations as civic associations, professional associations, unions, churches, and educational institutions or associations might well be helpful to the Commission. These groups are found in every community; *they usually concern themselves with a wide range of community problems and tend to be representative of a broad as distinguished from narrow interests, public as distinguished from private or commercial interest.* 359 F.2d at 1005. [Emphasis added.]

Reviewing the theory that a governmental agency itself is presumed to effectively represent the interest of the public "without the aid and participation of legitimate[citizen]representatives fulfilling the role of private attorneys general," the court stated that this was "one of those assumptions we collectively try to work with so long as they are adequate." *Id.* at 1003, 1004. The court reasoned that it could no longer believe such an assumption was valid if it became clear that it failed to stand up under the realities of actual experience and that the "gradual expansion

and evaluation of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide." *Ibid.*

In another "early" case which considered the standing of litigants representing non-economic conservation interests, *Road Review League, Town of Bedford v. Boyd*, 270 F.Supp. 650 (S.D. N.Y. 1967), the court ruled that a town, a civic association of residents of the town, two wildlife sanctuaries whose property would be affected by the proposed road, people whose property would be taken for the road, as well as a non-profit organization concerned with community problems *all* were entitled to standing under the *Scenic Hudson* rationale. The court found no reason why the word "aggrieved," as contained in the Administrative Procedure Act (5 U.S.C. § 702), the statute under which petitioners challenged, should not be interpreted as manifesting a congressional intent to confer standing on groups whose interests were allegedly disregarded by a government agency – just as the word "aggrieved" contained in the Federal Power Act was found, in *Scenic Hudson*, to confer standing. Though the court felt its decision to grant standing to plaintiffs who previously were not formal parties to any administrative proceedings might be an extension of the *Scenic Hudson* doctrine, it decided the extension was warranted by the rationale of that decision. 270 F.Supp. at 660, 661.

More recently, an unincorporated association of citizens residing near a proposed expressway, the Sierra Club, and the Village of Tarrytown, New York, initiated action in district court against the U.S. Secretary of Transportation and others in *Citizens Committee for the Hudson Valley v. Volpe*, 302 F.Supp. 1083 (S.D. N.Y. 1969). The court had no difficulty granting standing to the Village due to its allegation of direct economic loss. Regarding the standing of the Citizens Committee and the Sierra Club, the court found the problem more acute because they had no personal economic claim to assert, but ruled that they were sufficiently "aggrieved" by the alleged destruction of the natural resources of the river to maintain the court action.

The court reasoned that the *Scenic Hudson* and *Road Review* cases created standing if the court could find "a 'legislative intent' to create standing, absent a monetary claim, in the various statutes involved," and that when statutes involved in a controversy are themselves concerned with the protection of natural, historic, and scenic resources, then "a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency." 302 F.Supp. at 1092. In affirming the lower court decision, *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970), *cert. denied* 400 U.S. 949 (1970), the circuit court confirmed the standing of the conservation groups though the Rivers and Harbors Act of 1899 (33 U.S.C. §§401-406 K) contains no specific review provision (as did the Federal Power Act relied upon in *Scenic Hudson*). The court stated:

> Nevertheless, persons "aggrieved" by agency action pursuant to that statute are entitled to review on similar terms by the Administrative Procedure Act. We agree with the conclusion of Judge McLean in *Road Review League v. Boyd*, 270 F.Supp. 650, 661 (S.D. N.Y. 1967) that the meaning of "aggrieved" in one act is not different from its meaning in the other. Section 702 of the Administrative Procedure Act provides that a person "aggrieved" by agency action within the meaning of a relevant statute is entitled to judicial review thereof. 425 F.2d at 104.

The court identified two relevant statutes as well as a regulation requiring the Army Corps of Engineers to consider the environmental effects of projects it approves[14] and concluded:

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14. The Department of Transportation Act, 49 U.S.C. § 1653(f) [which declares a national policy to preserve the natural beauty of the countryside and requires consideration of environmental values when considering routes]; the Hudson River Basin Compact Act, 89 Stat. 847 (1966) [which describes the immense recreational and aesthetic values of the Hudson River Basin]; and Army Corps of Engineers Regulation, 33 C.F.R. 209.120(d).

> Thus administrative as well as congressional concern for natural resources in the present exercise of federal authority is evident. We hold, therefore, that the public interest in environmental resources – an interest created by statutes affecting the issuance of this permit – is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest. 425 F.2d at 105.

The plaintiffs evidenced the seriousness of their concern with local natural resources, said the court, by the fact that they organized for the purpose of cogently expressing that concern, that the intensity of their concern was apparent from the great expense and effort they undertook to protect the public interest they believed to be threatened by official action of governmental agencies, and that they "proved the genuineness of their concern by demonstrating that they [were] 'willing to shoulder the burdensome and costly processes of intervention' in an administrative proceeding." *Id.* at 104.

In *Environmental Defense Fund v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970), the court's consideration of standing led to a ruling that "the consumer's interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem." *Id.* at 1097. In this case, five conservation organizations which engaged in activities relating to environmental protection (the Enviornmental Defense Fund, National Audobon Society, Sierra Club, West Michigan Environmental Action Council, and Izaak Walton League, *intervenor*) challenged the U.S. Department of Agriculture's certification of DDT and requested that the pesticide's use be suspended. Applying the new *Data Processing* and *Barlow* two-step test for standing, the court ruled that "the biological harm to man and other living things" from continued use of DDT was sufficient allegation of "injury" by petitioners to satisfy the first part of the test and that the "zone of interests"

requirement was satisfied because the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. §§135 – 135 K) was designed to protect "not only the economic interest of the registrant but also the interest of the public in safety." 428 F.2d at 1096. In *Parker v. U.S.*, 309 F.Supp. 593 (D. Colo. 1970), several groups (including the Sierra Club), a town, and a magazine successfully brought suit to enjoin the sale of timber from a National Forest in Colorado. In an earlier declaratory judgment action before the same court, *Parker v. U.S.*, 307 F.Supp. 685 (D. Colo. 1969), the matter of the plaintiffs standing was resolved in their favor when the court concluded:

> It cannot be denied that plaintiffs are advancing the public interest; also they have special interest in the values Congress sought to protect by enacting the * * * statutes [under which the petitioners challenged the proposed sale]. We conclude that these statutes confer on groups and individuals such as the plaintiffs the status of "aggrieved persons" when the Secretary of Agriculture or the Forest Service fails to comply with the mandatory requirements of the Acts. 307 F.Supp. at 687.

More recently, another U.S. District Court ruled favorably regarding the standing of environmentalists in *E.D.F. v. Corps of Engineers*, F.Supp. No. LR-70-C-203 (E.D. Ark., *decided* 19th Feb. 1971), 2 ERC 1260 (BNA Environment Reporter), after a review of the requirements of *Data Processing* and *Barlow*. The court agreed with Judge Hamley's dissent, expressed in the 9th Circuit's decision on the case presently at bar (*Sierra Club v. Hickel*, 433 F.2d 24, (9th Cir. 1970), that:

> [T]he rationale of *Data Processing* and the other Supreme Court decisions, if not the precise holdings, clearly indicates that such plaintiff organizations as those involved in such cases have standing to sue. There can be no doubt that the corporate

plaintiffs are interested and antagonistic enough to present the issues vigorously and with the "concrete adverseness" referred to in *Baker v. Carr* [citations omitted]. Furthermore, at least one of the acts relied upon by the plaintiffs, the National Environmental Policy Act of 1969, makes clear the recognition by Congress of the important role of such private organizations by requiring all federal agencies to cooperate with "concerned * * * private organizations to further the policies of the Act. 2 ERC at 1282.

The cases outlined above, as well as a host of other cases,[15] would seem to indicate that a demonstrated interest,

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15. The following are additional decisions in which the rationale of the *Citizens Committee* and *Scenic Hudson* has been followed to grant standing to those who would challenge agency decision-making with regard to environmental or other public interest issues.

Environmental Cases

Nashville I-40 Steering Committee v. Ellington, 387 F. 2d 179, 180-181 (6th Circ. 1967), *cert. denied* 390 U.S. 921 (1968) [Federal Aid Highway Act of 1966, 23 U.S.C. §138]; *Gandt v. Hardin*, Civ. No. 1334, *unreported* (W.D. Mich., *decided* 11th Dec. 1969), *dismissed on other grounds:* 1. On the merits because the agency action was not arbitrary and capricious and 2. Laches [Multiple Use-Sustained Yield Act of 1960, 16 U.S.C. §§528-531]; *Crowther v. Seaborg*, 312 F.Supp. 1205 (D. Colo. 1969), *affirmed* 415 F.2d 737 (10th Cir. 1969) [Atomic Energy Act, 42 U.S.C. §§2012-2013, 2051]; *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, ___F.Supp.___, Civ. No. 70-82E (N.D. W. Va., *decided* 15th June 1970), *on appeal to 4th Cir.* [Multiple Use-Sustained Yield Act, *supra*, and Wilderness Act of 1964, 16 U.S.C. §1131]; *Pennsylvania Environmental Council v. Bartlett*, 315 F.Supp. 238 (M.D. Penn. 1970) [National Environmental Policy Act of 1969, 42 U.S.C. §4321]; *Izaak Walton League v. St. Clair*, 313 F.Supp. 1312 (D. Minn. 1970) [Wilderness Act, 16 U.S.C. §1131 (a)]; *Texas Committee on Natural Resources v. U.S.*, ___F.Supp.___, Civ. No. A-69-CA- 119 (W.D. Tex., *order granting stay* 5th. Feb. 1970), 1 ERC 1303 [National Environmental Policy Act, *supra*]; EDF *v. Corps of Engineers*, ___F.Supp. ___, Civ. Ac. No. 2655-69 (D. D.C., *memorandum opinion* 27th. Jan. 1971) [NEPA, Fish and Wildlife Coordinating Act, 16 U.S.C. §§ 661-665, and Act of July 23, 1942, 56 Stat. 703].

though non-economic, in environmental protection and preservation of natural resources on the part of responsible individuals or organizations constitutes a sufficient public interest in the result of governmental agency action under a relevant statute (either by express language of the statute itself or under the Administrative Procedure Act) for them to have standing under any currently applied test promulgated by the U.S. Supreme Court.

B. Absent A Clear Showing Of Contrary Legislative Intent, The Administrative Procedure Act Secures The Right Of Judicial Review For Persons "Aggrieved" By Agency Action.

Under the provisions of the Administrative Procedure Act, 5 U.S.C. §§551 – 706 (and, particularly Sections 701 – 706 thereof), judicial review of governmental agency action is provided for persons "aggrieved" by that action when the particular statutes under consideration did not by their own terms provide for such review and when a judicial review is not specifically foreclosed by an expression of congressional intent that agency determination be final. Section 702 of the Act (5 U.S.C. § 702 – the Administrative Procedure Act will hereafter be referred to as APA) provides that a "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Although this section of the APA refers to parties "aggrieved" rather than "aggrieved in fact" (analogous to the "injured in fact" requirement set forth in the *Data Processing* and *Barlow* cases), the legislative history of the APA supports the contention that the words "in

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Non-Environmental Cases

Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968) [National Housing Act, 42 U.S.C. §1455(c)]; *Powelton Civic Home Owners Ass'n. v. Dept. of Housing and Urban Development*, 248 F.Supp. 809, 821–828 (E.D. Penn. 1968) [National Housing Act, *supra*]; *Scanwell Laboratories v Shaffer*, 424 F.2d 859 (D.C. Cir. 1970) [Food, Drug and Cosmetic Act, 21 U.S.C. §371(f)(6)]

fact" were implied. The Senate Committee Report, S.Doc. No. 248, 79th Cong., 2d Sess. 212, 276 (1946), states that "[t]his subsection [§702] confers a right of review upon any person adversely affected *in fact* by agency action or aggrieved within the meaning of any statute." [Emphasis added.] Though this exact language did not appear in the statute as finally enacted, the Attorney General of the United States stated that the language of the Senate document was reflective of existing law. *Id.* at 310.[16]

Further supporting the contention that the APA should be given a quite liberal interpretation in favor of those who propose to litigate under its terms is the statement of this Court in the *Barlow v. Collins* decision that it is "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict access to judicial review. 397 U.S. at 167.[17] Clearly, the APA was designed to apply to those situations not proscribed by the Act itself where a person *aggrieved in fact* seeks judicial review – regardless of a lack of legal right or lack of specific statutory language in some other Act granting judicial review.

Section 701 of the APA (5 U.S.C. §701) enumerates those actions not reviewable and includes those situations [5 U.S.C. §701(a) (1)] where statutes "preclude judicial review" as well as those [5 U.S.C. §701(a) (2)] where "agency action is committed to agency discretion by law." When the

16. The D.C. Circuit Court of Appeals conducted a thorough review of the APA's legislative history which is reported (per Tamm, J.) in *Scanwell Laboratories, Inc. v. Shaffer*, 424 F 2d 859 (D.C. Cir. 1970).

17. This position was stated previously and elaborated upon in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), which see in support of the contention that the Act's "generous review provisions" must be given a "hospitable interpretation." See also: *Rusk v. Cort*, 369 U.S. 367, 379-380 (1962). It must be noted that the government does not concede that the Administrative Procedure Act is jurisdictional and relies upon Section 702 of the Act (5 U.S.C. §702) to support its claim that jurisdiction must be found elsewhere in the "relevant statute." In further support of the claim that the APA is jurisdictional, see Professor Davis' discussion in 4 K.DAVIS, ADMINISTRATIVE LAW TREATISE chapter 28 (1958) and, in particular, §28.08.

6th Circuit Court of Appeals addressed itself to the question of agency discretion in deciding *Knight Newspapers, Inc. v. U.S.*, 395 F.2d 353 (6th Cir. 1968), the court ruled that:

> A court may not review a decision committed to the discretion of an agency pursuant to a permissive type statute, but may do so where the decision was made pursuant to a mandatory type statute even though the latter decision involves some degree of discretion. * * *. 395 F.2d at 358.

Many of the congressional acts relied upon by environmentalists in support of claims of improper agency action contain certain mandatory factors which must be considered in agency action pursuant to those acts – factors which if ignored by an agency will subject its decisions to judicial review.[18] Referring to just such a reliance on the APA to force judicial review of agency action, the decision in *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97, 102, (2d Cir. 1970), *cert. denied* 7th Dec. 1970, affirming the district court's grant of jurisdiction, held that:

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18. This is a partial list of Acts of Congress relied upon in support of claims that litigants are "aggrieved by agency action within the meaning of a relevant statute:"

16 U.S.C. § 1 [National Park Service Act]; 16 U.S.C.§§401-466 [Rivers and Harbors Act]; 16 U.S.C.§§528-531 [Multiple Use-Sustained Yield Act]; 16 U.S.C.§§580(m), (n) [conservation guidelines for Corps of Engineers in reservoir development]; 16 U.S.C. §§ 661-668 [Fish and Wildlife Coordinating Act]; 16 U.S.C. § 695(k) [Migratory Waterfowl Act]; 16 U.S.C. §§ 701 *et seq.* [Migratory Bird Act]; 16 U.S.C. §§ 757(a)-757(f) [Anadromous Fish Act]; 16 U.S.C. §§ 760(a)-760(g) [Migratory Game Fish Act]; 16 U.S.C. §§ 803(a) *et seq.* [Federal Power Act]; 16 U.S.C. §§ 1131 *et seq.* [Wilderness Act]; 16 U.S.C. § 1271 [Wild and Scenic Rivers Act]; 23 U.S.C. § 138 [Federal Aid Highway Act]; 33 U.S.C. § 540 [Rivers and Harbors Act]; 42 U.S.C. §§ 2012-2013 [Atomic Energy Act]; 42 U.S.C.§§4321-4347 [National Environmental Policy Act]; 49 U.S.C. §§ 1651(b)(2) 1653(f) [Department of Transportation Act].

> There can be no question at this late date that Congress intended by the Administrative Procedure Act to assure comprehensive review of a "broad spectrum of administrative actions," including those made reviewable by specific statutes without adequate review provisions as well as for those for which no review is available under any other statute. *Abbott Laboratories v. Gardner*, [387 U.S. 136 (1967)] at 140; *see* S.Rep. No. 752, 79th Cong. 1st Sess., 26 (1945); H.R.Rep. No. 1980, 79th Cong. 2d Sess., 41 (1946).

Quite recently, this Court was called upon to consider the scope of the APA as a means of providing judicial review of acts of the Federal Highway Administrator in *Citizens to Preserve Overton Park v. Volpe*.__U.S.__, 91 S.Ct. 814 (1971), and found that the "threshold question — whether petitioners are entitled to any judicial review — is easily answered." 91 S.Ct. at 820. After reviewing the provisions of the APA, some of its legislative history, and the challenged actions of the Secretary of Transportation, the Court concluded that judicial review was clearly available to the petitioners. Although standing was not an issue in this instance, it should be noted that action was brought by a citizens organization, individuals, and *a conservation group*.

Since Congress has manifested its intent that the APA act as a grant of federal court jurisdiction to review statutes which do not contain their own review provisions, there must likewise be a manifestation of congressional intent in the APA to confer standing upon those environmental litigants, representing the public interest, who allege they are aggrieved because environmental provisions of a federal statute were not properly considered by some governmental agency. Since the 9th Circuit does not agree with this conclusion [*Sierra Club v. Hickel*, 433 F.2d 24, 29-30 (9th Cir. 1970)], we concur with Professor Davis and respectfully urge the Court to take this opportunity to make a full-scale inquiry into the legislative history of the Administrative Procedure Act's jurisdictional provisions as they relate to the

standing of environmental litigants to initiate judicial review proceedings in the public interest.[19]

III. THE NINTH CIRCUIT'S BASIC CONCEPT OF STANDING IS CONTRARY TO THE CURRENT LAW AS FORMULATED BY THIS COURT.

A. It Is Well Established That The "Injury In Fact" Suffered By A Litigant Need Not In Any Way Be Economic.

Throughout the Circuit Court's reasoning, as announced in *Sierra Club v. Hickel*, 433 F.2d 24 (9th Cir. 1970), there is evidence of a mistaken notion of what the two-step test announced in *Data Processing* and *Barlow* has meant to the law of standing. By these cases, as well as many others, it is well established that the "injury in fact" suffered by a plaintiff need not in any way be economic. Yet, the reasoning by the Circuit Court is preoccupied with finding some economic or proprietary interest in terms of present case law which will suffice to explain their *Sierra Club* decision in economic terms. This reasoning, we submit, is clearly erroneous.

The following cases were distinguished in order to deny standing to the Sierra Club - who, admittedly, has no economic interest at stake in the suit:

1. *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), was held inapposite because the statute under which that action was brought contained a specific right of judicial review therein for "aggrieved" parties – and several petitioners (the Towns) who joined in the action had "sufficient actual economic interest" (433 F.2d at 30) in their own right to obtain standing. Since the Sierra Club did not have a

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19. Davis, The Liberalized Law of Standing, 37 U.CHI. L.REV. 450, 462 (1970). See Also: *Allen, The Congressional Intent to Protect Test: A Judicial Lowering of the Standing Barrier*, 41 U.COLO.L REV. 96(1969); Heiser, *Standing and Sovereign Immunity: Hurdles for Environmental Litigants*, 12 SANTA CLARA LAWYER ___ (1971).

specific right to judicial review manifested in the statutes under which it litigated, and because it had not joined local property owners, it was denied standing.

2. The 9th Circuit pointed out that in *Parker v. U.S.*, 307 F.Supp. 685 (D. Colo. 1969), and *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97 (2d Cir. 1970), *cert. denied* 400 U.S. 949 (1970), the Sierra Club obtained standing primarily because it joined with local residents and users, but that in the present case the Sierra Club failed to join "persons or organizations with a direct and obvious interest" (433 F.2d at 33). Why is this joinder necessary? Each party maintaining an action should assert a sufficient interest to be granted standing in his own behalf. By the 9th Circuit's reasoning, some tangible economic interest must be shown by one of the parties to obtain standing. We submit that this is not the present state of the law.

3. In analogizing *Powelton Civic Homeowners Ass'n. v. Department of HUD*, 284 F.Supp. 809 (E.D. Penn. 1968), to the *Sierra Club* case, the majority said "if the homes of residents at Mineral King were to be razed and those homeowners objected" (433 F.2d at 31) there would then be standing for those petitioners – again raising an economic interest "test" for standing.

4. The Circuit Court pointed out that *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966), was a consumer case and that *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970), was a competitor's suit. The court attempted to reconcile their decisions on standing by pointing out that the direct injury in fact alleged in both cases was somehow proprietary or economic. This notion is understandable, but contrary to the decisions in *Data Processing* and *Barlow* which clearly recognize that injury to economic interests does not furnish the sole basis for standing.

Traditionally, courts could be assured that the adverseness necessary for a case and controversy would be present if some economic interest were at stake in the litigation.

Seemingly, the 9th Circuit is reluctant to acknowledge the fact that many people and organizations today are motivated as much by concern for public welfare as by their own economic interests. This change in motivation has been recognized by most courts and may be evidenced by the recent liberalization in the law of standing.

Judge Trask's opinion for the majority in another recent 9th Circuit case, *Alameda Conservation Association v. California*, __F.2d__, Civ. No. 22,961 (9th Cir., *decided* 19th Jan. 1971), 2 ERC 1175, is particularly elucidating (since Judge Trask also wrote the majority opinion in the *Sierra Club* case). In the *Alameda* case there were three separate opinions just on the issue of standing. It seems that the substitution of Judge Merrill (who was on the bench in the *Alameda* case) for Judge Kilkenny (who was on the bench in the *Sierra Club* case) resulted in a decision which took a more liberal position on standing (2 ERC at 1177 *et seq.*) than did *Sierra Club*. The law of standing should be capable of a more uniform expression!

In the *Alameda* case, an association of San Francisco area citizens sought to enjoin the continued filling of San Francisco Bay. Judge Trask was willing to grant standing only to those landowners who were proximate users of the Bay – those whose land touched the Bay. Because the Association itself did not own any land bordering the Bay, "it simply [was] not hurt in any practical way which entitled it to call upon the courts for redress or protection." 2 ERC at 1177. Under this rationale, only those landowners whose land bordered on a national park would have standing to pursue their grievances in court. But, in a very real sense, the public, the Nation, is the "local property owner" in our National Parks and National Forests - and, thus, one who asserts the public interest should have standing to litigate issues concerning their use. Judge Trask continues:

> If the Association here had a recreational operation which it conducted and which the defendants interfered with, it could assert it; if its physical

> surroundings were made unattractive, this aesthetic infringement would create standing; or if it operated a conservation program, an intereference with that operation would establish standing. 2 ERC at 1177-1178.

Even this recognition that aesthetic, conservational and recreational interests may establish standing hinges upon whether the plaintiff owns property or not or would suffer some form of economic loss to its facilities. As enunciated by this United States Supreme Court, the current test for standing does *not* require that some economic injury be shown in order to be granted standing.

B. If The General Intent Of Congress, Expressed In Any Statute, Is To Protect A Particular Interest, Those Parties Who Assert Injury To The Protected Interest Should Have Standing To Bring Action Under That Statute.

Perhaps the reason the 9th Circuit misapplied the second part of the *Data Processing* and *Barlow* test for standing was because it obtained its "basic concept of standing" (433 F.2d at 28) from a 1943 decision, *Associated Industries v. Ickes*, 134 F.2d 694, 700 (2d Cir. 1943). That case held that some private substantive legally protected interest must be involved before the court could grant standing. This type of test, however, has been soundly discredited by the new U.S. Supreme Court two-step test as well as by the 2d Circuit's more recent decisions in such cases as *Scenic Hudson* and others. In attempting to apply the second part of the current test for standing, the Circuit Court should have asked: Does the statutory provision authorizing administrative action compel consideration of the public interest? [Allen, 41 U. COLO. L. REV. at 98.] If this intent to protect is present, the public – or one asserting the public interest – has the right to bring suit. The *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968) case

is a good example of how this test is applied. Here, Negro and Puerto Rican citizens, displaced by urban renewal, sued the local redevelopment agency and HUD. They based their claim on the Housing Act of 1949 [42 U.S.C. §§ 1441-1460] which provided that displaced tenants were entitled to decent relocation housing. The language in the Act was general, but its clear intent was to protect the persons who might be adversely affected by urban renewal.

Embodied in the Acts establishing the Sequoia National Park [16 U.S.C. §43] and Sequoia National Game Refuge [16 U.S.C. §688], too, is general language the purpose of which is to assure that these lands will be protected for the public. Such an intent to protect America's natural heritage is clearly present not only in these Acts, but in most other Acts of Congress as well. As Judge Hamley pointed out in his concurring opinion, 433 F.2d at 28, the Sierra Club has brought this action at bar on behalf of thousands of members who share a deep interest in the conservational and aesthetic values which Congress intended to be safeguarded by the statutes in question and the regulations and practices conducted under them. Clearly, the interests the Sierra Club seeks to protect are the same interests that Congress meant to protect when it set aside lands in the public domain. The fact that the Sierra Club, which has such a long history of devotion to the field of conservation, and others are denied the right to challenge governmental agency action with regard to lands within the 9th Circuit's jurisdiction is especially frightening when one considers how much federal land lies within the 9th Circuit. More than sixty-eight percent of the total land within the 9th Circuit is federally-owned; and more than seventy-eight percent of *all* federally-owned land in the United States is in the 9th Circuit.[20] It is vital that those who assert the public's

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20. The total land area of all states in the 9th Circuit's jurisdiction amounts to 863,242,880 acres. The total amount of federally-owned land in those 9th Circuit states amounts to 592,669,690 acres or 68.66% of the total land. The total amount of federally-owned land in the United States is 755,368,055 acres. 78.46% of *all* federally-owned land in

interest in the protection of these lands be allowed access to the courts. Though challenge of federal agency action in the more receptive D.C. Circuit, a kind of "forum -shopping," is an alternative, it is not a proper remedy for the 9th Circuit's denial of standing to environmental litigants.

CONCLUSION

For the foregoing reasons we respectfully urge that the judgment of the court below on standing be reversed.

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Of counsel.

MAY, 1971.

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the U.S. is in the 9th Circuit. Source: Public Land Law Review Commission, *One Third of the Nation's Land: A Report to the President and the Congress*, Appendix F at 327 (June 1970).

MAY 25 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 70-34

SIERRA CLUB,

Petitioner,

v.

ROGERS C. B. MORTON, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ENVIRONMENTAL DEFENSE FUND AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 939

SIERRA CLUB,

Petitioner,

v.

ROGERS C. B. MORTON, et al.,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE ENVIRONMENTAL DEFENSE FUND AS AMICUS CURIAE

INTEREST OF THE ENVIRONMENTAL DEFENSE FUND

The Environmental Defense Fund (EDF) is a non-profit, public-benefit corporation organized under the laws of the State of New York. Its nationwide membership of 21,000 includes scientists, educators, lawyers, and other citizens dedicated to the protection of our environment and the wise use of the nation's natural resources. Among EDF's primary objectives is "to effect a joining of the best scientific findings with the most appropriate social action discovered by the social sciences and legal theory in order [to] * * * best

promote a quality environment" [Bylaws, Art. 1:2(d)]. EDF's "social action" includes education, research, and—when necessary "to prevent * * * environmental degradation"—legal action, which is designed in part "to provide scientists fair and impartial forums in which their scientific findings may be presented objectively to their fellow citizens" [*id.*, Art. 1:2(f)].

In accordance with its objectives, EDF through its Scientific and Legal Advisory Committees evaluates and defines environmental issues, collects research data relating to those issues, and determines whether litigation is the appropriate course to follow. Its national membership and professional resources thus enable EDF to focus public attention upon environmental incursions that might otherwise go unrecognized. Its prosecution of many major environmental lawsuits[1] has established it as one of the nation's most effective and responsible litigants in this important field.

EDF has a vital interest in the outcome of this case. First, if the Ninth Circuit's view on standing were adopted

[1] See, *e.g.*, *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (DDT pesticides); *Environmental Defense Fund, Inc. v. United States Dep't of Health, Educ. & Welfare*, 428 F.2d 1083 (D.C. Cir. 1970) (DDT tolerance levels); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 2 BNA Env. Rep. Cas. 1260 (E.D. Ark. 1971) (Gillham Dam); *Environmental Defense Fund, Inc. v. Montrose Chemical Corp.*, C.D. Cal., Civil No. 70-2389-ALS (complaint filed October 22, 1970) (DDT discharge in coastal waters); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 2 BNA Env. Rep. Cas. 1173 (D.D.C. 1971) (cross-Florida barge canal); *Environmental Defense Fund, Inc. v. Hardin*, 2 BNA Env. Rep. Cas. 1425 (D.D.C. 1971) (Mirex); *Wilderness Society, Inc. v. Hickel*, 1 BNA Env. Rep. Cas. 1335 (D.D.C. 1970) (trans-Alaska pipeline); *Environmental Defense Fund, Inc. v. Resor*, D.D.C., Civil No. 2394-70 (order filed August 14, 1970) (nerve gas); *Environmental Defense Fund, Inc. v. Hoerner Waldorf Corp.*, 1 BNA Env. Rep. Cas. 1640 (D. Mont. 1970) (paper mill discharges). EDF has also filed petitions and/or been heard as a party in proceedings before numerous federal agencies, including the Atomic Energy Commission, the Environmental Protection Agency, the Federal Aviation Administration, the Federal Power Commission, the Federal Trade Commission, and the National Forest Service.

by this Court, doubt would be cast on the ability of EDF to accomplish its objectives through litigation in the federal courts where it considers such litigation necessary to protect our natural environment. Second, EDF has an important organizational commitment to promoting the proper conduct of federal officials in decisions that affect public lands.

Petitioner and respondents have consented to the filing of this brief.[2]

STATEMENT OF THE CASE

The Sierra Club, a non-profit California corporation, brought this action to enjoin the issuance of federal permits for the development of a large private resort in the Mineral King Valley—located in the Sequoia National Game Refuge area of Sequoia National Forest—and the construction of an access road through the Sequoia National Park. In its motion for preliminary injunction the Sierra Club asserted that the threatened action would permanently destroy natural values of public lands and would irreparably harm the public interest in conserving those values. It alleged that the Secretary of the Interior would exceed his authority by authorizing the construction of the new highway and the installation of a private transmission line across the Park, and that the Secretary of Agriculture would exceed his authority by granting the developer a revocable permit covering some 13,000 acres of National Forest land in addition to a term permit covering 80 acres.

The District Court granted the preliminary injunction. But on appeal the Ninth Circuit vacated the injunction, holding (1) that the Sierra Club lacked standing and (2) that the Sierra Club had shown neither a "reasonable certainty" that it would prevail nor irreparable injury. Judge Hamley, concurring in the result, would have held that the Sierra Club had standing.

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[2]The written consents have been filed with the Clerk.

We discuss only two of the issues raised in this case: whether the Sierra Club has standing to challenge the administrative actions of federal officials in approving the Mineral King project, and whether the Secretary of the Interior acted within the scope of his statutory authority in approving a routing through Sequoia National Park of an access highway to the Mineral King resort. The facts insofar as they are relevant to the issues we discuss are stated more fully in our argument.

INTRODUCTION AND SUMMARY

The standing issue presented by this case—whether a national conservation organization may invoke the jurisdiction of the federal courts to challenge administrative action that affects our natural environment—comes at a time of increasing recognition both of the crucial role that organizations play in modern society and of the critical importance to the future of this planet of sound and enlightened techniques of environmental protection.[3] That these complementary trends may here be conjoined is hardly surprising. As the urgency of environmental protection and the magnitude of the task have become more apparent, both the need and the opportunity for citizen participation have expanded. Aside from involvement at the administrative level, the most effective means of citizen participation has been resort to the courts to enforce the laws relating to preservation of natural resources.

This has by all accounts been both effective and useful. The Chairman of the Council on Environmental Quality recently expressed the view, in a letter supporting the tax exempt status of groups that litigate to protect the environment, that:

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[3]This Court noted in the opening sentence of its opinion in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 39 U.S.L.W. 4287, 4288 (March 2, 1971), the "growing public concern about the quality of our natural environment * * *."

> "Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reinforcing government environmental protection programs."[4]

That organizational litigants, and especially national groups like the Sierra Club and EDF, have played a central part in this favorable development simply reflects their capacity and willingness to identify, study, and, where necessary, challenge administrative action or inaction that may be harmful to the environment. As organizations with national orientation and substantial membership, they bring to bear the professional and financial resources necessary to participate effectively in what is frequently a technical and complex area.

If it were not for such groups, many critical environmental issues might never be recognized or, if recognized, might never be brought forcefully to the attention of the agencies or the courts. Judge Plummer observed in the recent case of *Sierra Club v. Hardin*, 2 BNA Env. Rep. Cas. 1385, 1392 (D. Alaska 1971), that barring environmental groups from the federal courts "would have the practical effect of preempting many meritorious actions, as one individual, or a small number of individuals, would have to sustain the entire financial burden of the lawsuit." The costs of effective litigation are so great and the opportunity for an award of damages so unusual that "few members of the general public will have the resources or courage to face such odds for the sake of vindicating a right to which all are entitled as a matter of law."

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[4] 1 BNA Env. Rep. 629 (No. 25, Oct. 16, 1970). The letter, written to the Commissioner of Internal Revenue, explained that litigating groups have strengthened anti-pollution enforcement, have encouraged elimination of regulatory gaps, and have represented the public's interest in enforcement of new governmental procedures. *Id.* at 701 (No. 28, Nov. 6, 1970).

Organizations are, by design and function, able to distill and effectively channel the views and interests of many individuals. They are increasingly looked to both by citizens who wish to express their views through resourceful and vigorous representatives and by all three branches of the government, which seek reliable expressions of citizen views. As Judge Leventhal recently remarked in a related context:

> "The underlying reality is that trade associations and other group representatives of interests are accepted, sometimes welcomed, by executive officials and agencies as a means of presenting and organizing in manageable form the inquiries and objections that the Government must consider. * * * Interest groups are, in today's complex society, an indispensable part of an effective channel of communication between government and the persons whose conduct the government seeks to affect."[5]

In matters of environmental protection, where an unwise or unlawful action may affect the entire population but where frequently no one individual suffers special or perhaps even noticeable injury, organizations play an especially important role in assessing and publicizing the ultimate impact of the action and in formulating an appropriate response. Thus, Judge Merrill has stated persuasively in the context of environmental litigation:

> "Where, as here, the case presents issues of public moment—where what is at the heart of the problem is an alleged injury common to a substantial segment of the public—it may well be that the common cause can better and more earnestly be presented through

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[5] *National Automatic Laundry & Cleaning Council v. Schultz*, D.C. Cir., No. 22,692 (March 31, 1971), slip opinion p. 7. The Second Circuit in its landmark *Scenic Hudson* decision noted the corollary that "[r]epresentation of common interests by an organization * * * serves to limit the number of those who might otherwise apply for intervention and serves to expedite the administrative process." *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 617 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

> an association of those affected than through a collection of individuals each tendering his own modest share of the common injury."[6]

The Congress has, in Section 101 of the National Environmental Policy Act of 1969,[7] recognized the special role of environmental groups by declaring that "it is the continuing policy of the Federal Government" to cooperate with "concerned * * * private organizations" in furthering the objectives of the Act. And the Council on Environmental Quality, in a recent statement of federal environmental policy, has made clear its "support for the elimination of procedural obstacles that bar citizens from litigating the merits of environmental controversies over Government action."[8] The Council accordingly "subscribes to the broadened concept of standing to sue expressed in judicial decisions such as that of the Second Circuit" in *Citizens Committee,*[9] a case we discuss later, and it has expressly endorsed the following resolution of its Legal Advisory Committee:

> "Where an organization or group of citizens devoted to, or with a demonstrated interest in environmental protection asserts a claim against an agency of the Government in reliance on the provisions of the National Environmental Policy Act, or of other legislation designed to protect the environment, the interposition by the Government of the defense of lack of standing is inconsistent with federal environ-

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[6] *Alameda Conservation Ass'n v. California,* 437 F.2d 1087, 1097 (9th Cir. 1971) (concurring opinion), *cert. denied,* 39 U.S.L.W. 3455 (April 19, 1971).

[7] Pub. L. 91-190, 83 Stat. 852, 42 U.S.C.A. § 4331 (Supp. 1971).

[8] Statement of Timothy Atkeson, General Counsel, Council on Environmental Quality, in *Hearings on S. 1032 Before the Subcommittee on the Environment of the Senate Commerce Committee,* 92d Cong., 1st Sess. (April 15, 1971), reprinted at 1 BNA Env. Rep. 1459 (No. 52, April 23, 1971).

[9] *Citizens Committee for Hudson Valley v. Volpe,* 425 F.2d 97 (2d Cir.), *cert. denied,* 400 U.S. 949 (1970).

mental policy, as exemplified in the National Environmental Policy Act and in other legislation."[10]

If, despite this unequivocal statement, the government persists in its challenge to the Sierra Club's standing in this case, we think that its arguments, judged according to the criteria established by this Court, must fail. The Court in *Data Processing*[11] and *Barlow*[12] established a three-pronged test for standing: (1) whether the plaintiff has a stake in the outcome of the controversy, (2) whether its interests are within the zone of interests to be protected or regulated by the statute in question, and (3) whether judicial review has been precluded.

The "zone of interests" and reviewability prongs are, in the context of this case, relatively insignificant. It is perfectly evident that the relevant statutes create a zone of protected interests that embraces the interests asserted by the Sierra Club in the conservation and sound maintenance of public lands. And, in view of this Court's recent decisions concerning reviewability, we can foresee no reasonable argument that the actions of the federal officials here challenged are either immunized by statute from judicial review or committed by law to agency discretion.

The only live issue, in our view, concerns the Sierra Club's stake in the outcome. While this Court has not previously considered what allegations may be necessary to demonstrate a sufficient stake in the outcome for an organization like the Sierra Club, which alleges no private economic harm but which asserts instead the public interest in environmental protection, it has clearly identified the objective of the standing requirement—to ensure that the dispute is

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[10]Statement of Timothy Atkeson, *supra* note 8.

[11]*Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

[12]*Barlow v. Collins*, 397 U.S. 159 (1970).

presented in an adversary context. In our view that objective would be fully served by the rules we propose, rules that have been applied successfully for years by the lower federal courts.

First, an organization's own interests, as demonstrated by its activities and conduct, may be injured sufficiently by government actions that disregard those interests to ensure a stake in the outcome. Second, regardless of whether an organization has suffered injury to its interests, it may serve as representative of the interests of those of its members who themselves are affected by the challenged action. Third, irrespective of injury to its interests or to its members, an organization may in appropriate circumstances serve as a responsible and representative spokesman for the interests either of a large class of persons who are affected or, where the effects of the action are sufficiently generalized, of the public at large. While these are meant to be alternative standards—that is, an organization may have standing if it meets any one of the three—we believe the Sierra Club in the context of this case satisfies each.

The court below, however, applied a far more restrictive standard—namely, that an organization may sue only upon allegations of tangible injury to its property, its status, or its members. This standard we view as contrary to both sound precedent and wise policy, and we urge this Court to reject it. It seems to us incontestable that an environmental organization *can* present in an adversary context a dispute concerning the use of natural resources, even where its own property is not to be injured. We believe the rules developed by the lower courts provide excellent guidelines—meriting this court's approval—for determining whether, in a specific case, the particular organizational complainant *in fact* has a stake in the outcome.

Apart from standing, we address only one other issue in this brief: whether the Secretary of the Interior acted within the scope of his statutory authority when he approved the use of a corridor through Sequoia National

Park for construction of the Mineral King Highway—a high-speed, high-volume access route to a proposed recreational development located beyond the park boundaries. The limits of the Secretary's authority are fixed by statutes requiring that the national parks be administered for the purposes of preserving them and providing for their enjoyment by the public. Approval of the road was unauthorized unless the Secretary reasonably considered that its construction was justifiable in terms of these purposes. In view of the known facts—that construction would have a damaging ecological impact, that Sequoia National Park is already an area of intensive public use, that handling automobile traffic is a growing problem in the national parks generally, and that the Director of the National Park Service himself seems to believe that building high-speed roads is not the way to make park experiences available to the public—it is doubtful whether the Secretary's action could be regarded as reasonable.

But our principal contention is not that the Secretary unreasonably concluded that the Mineral King Highway would serve a park purpose. Rather it is that, so far as the record discloses, he never *in fact* concluded that a park purpose would be served, or even was aware of the limitations on his statutory authority that prevent him from subordinating park interests to other interests—here the promotion of a commercial enterprise outside the park—that appear to him to be of paramount public importance. Not only is the record silent, and therefore inadequate, on these points, but the *post hoc* rationalizations of the Secretary's action that the record does contain indicate that he misconstrued his statutory authority to the extent he may have thought about it at all. Likewise, had the Secretary taken account of the considerations properly relevant to his decision to approve construction of the road—and here again the record fails to disclose what was taken into account and how its relevance was appraised—there is ample reason to believe that a park routing for the Mineral King Highway would have been rejected.

ARGUMENT

I

STANDING

In considering a matter as complex as standing,[13] one must have clearly in mind the sources of the doctrine and the policies that underlie it. In the case of standing, there are two distinct sources for the various rules.

First, standing as an aspect of justiciability is grounded in Article III of the Constitution, which limits the judicial power of federal courts to "cases" and "controversies." *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968); see *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151-152 (1970). In this respect, an inquiry as to standing focuses on the party seeking to assert a claim rather than on the issues he seeks to raise, so that "when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue * * *." *Flast*, 392 U.S. at 99-100. This requirement of a "proper party" is thought necessary to ensure that the dispute sought to be adjudicated "will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.* at 101. In considering whether a particular complainant is in fact a proper party, courts look to the complaint for allegations supporting the party's "personal stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Flast*, 392 U.S. at 101; *Barlow v. Collins*, 397 U.S. 159, 164 (1970). The principal issue to which we address ourselves in this section of our brief concerns the kind of allegations that are necessary to demonstrate such a stake in the outcome.

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[13] "Standing has been called one of 'the most amorphous [concepts] in the entire domain of public law.'" *Flast v. Cohen*, 392 U.S. 83, 99 (1968).

In addition to the constitutional question, standing involves statutory limitations and policy considerations. Thus, the Congress can, within the confines of Article III, restrict or broaden access to the federal courts in terms of either parties or issues. See *Data Processing*, 397 U.S. at 154. In the absence of statutory command, the Court may apply a "rule of self-restraint" formulated for its own governance. *Id.; Barrows v. Jackson*, 346 U.S. 249, 255 (1953). An example of such a rule is that even one who has a stake in the outcome may not ordinarily challenge the constitutionality of state action by invoking the rights of others. *Id.*

The question presented by this case is whether an established national organization, founded and operated for the purpose of promoting the conservation and sound maintenance of the nation's natural resources, must be denied, for either constitutional or other reasons, standing to challenge allegedly unlawful administrative action affecting the public lands. We show in the following pages that, judged according to the standards that have been established by this Court and applied in the lower federal courts, such an organization may, and in the circumstances of this case does, have standing to sue.

A. Framing the Issue

We start by describing the analytic framework established by this Court for the consideration of standing questions, and then, in order to define the issue in terms of that framework, we recount the treatment given the Sierra Club's allegations by the courts below.

1. *The prevailing test.* This Court has in several recent decisions articulated a threefold test for standing to sue in the federal courts. The first question is the constitutional one—whether the plaintiff has "the personal stake and interest that impart the concrete adverseness required by Article III." *Barlow*, 397 U.S. at 164. This stake-in-the-outcome test is satisfied by an allegation that "the chal-

lenged action has caused [the complainant] * * * injury in fact, economic or otherwise," *Data Processing*, 397 U.S. at 152, although, as we show below, there are other ways to demonstrate a stake in the outcome.

The second and third tests are grounded in statutory law. They are "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," *Data Processing*, 397 U.S. at 153, and "whether judicial review * * * has been precluded," *id.* at 156. Both tests are, at least in the context of administrative action, evidently rooted in the provisions of the Administrative Procedure Act. Thus, the zone-of-interests standard derives from 5 U.S.C. § 702, which limits judicial review to persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute * * *." And the reviewability test has its source in 5 U.S.C. § 701(a), which authorizes judicial review of administrative determinations "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

2. *The Sierra Club's allegations.* The Sierra Club in its complaint (A. 3-12),[14] which antedated the *Data Processing* and *Barlow* decisions, alleged: (a) that it is a non-profit corporation organized and operating under the laws of the State of California with a national membership of 78,000 and a San Francisco Bay area membership of 27,000; (b) that "for many years the Sierra Club by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested"; (c) that among its "principal purposes" is the protection

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[14] Throughout this brief our references to the Appendix are indicated by "A". Materials that are part of the record but are not printed in the Appendix are indicated by "R".

and conservation of the resources of the Sierra Nevada Mountains; (d) that it would be aggrieved, and its "interests would be vitally affected," by the acts of the defendants; and (e) that the defendants would, by their past and threatened acts relating to the proposed Mineral King project, exceed their statutory authority.

3. *The courts below.* a. The District Court's decision upholding the Sierra Club's standing and granting preliminary relief was rendered in an unreported opinion which, as to the standing issue, stated simply: "Sierra Club, a non-profit California corporation, organized and existing for the purposes described in its complaint * * *, may be held to be sufficiently aggrieved to have standing as a plaintiff herein" (A. 197).

b. Although the briefs to the Court of Appeals were addressed in large part to the old "legal interest" test of standing,[15] a test that was thereafter expressly abandoned in *Data Processing*, 397 U.S. at 153 & n.1, and although the opinion of the Court of Appeals bore traces of "legal interest" terminology,[16] the court nevertheless endeavored to

[15] See, *e.g.*, Brief for Appellees, pp. 8-15. The "legal interest" test differs from the "zone of interests" test in that the former required not merely that the complainant's interests be arguably protected but that he in fact had "a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939).

[16] Thus, the court implied that the Sierra Club would be permitted to sue if it alleged damage to "an interest * * * entitled to legal protection * * *" (433 F.2d at 28), or if it could point to "an element of legal wrong being inflicted upon" it (*id.* at 32). The cases quoted and evidently relied upon were likewise cast from the discarded legal interest standard. The court quoted extensively the "legally protected interest" and "legal wrong" language from *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969) (opinion of Mr. Justice Marshall); *National Ass'n of Securities Dealers, Inc. v. SEC*, 420 F.2d 83, 104 n.5 (D.C. Cir. 1969) (Burger, J., concurring), *vacated*, 39 U.S.L.W. 4406 (U.S., April 5, 1971); *Associated Industries, Inc. v. Ickes*, 134 F.2d 694, 700 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943).

apply to the Sierra Club the three-pronged test of *Data Processing*—stake-in-the-outcome, zone-of-interests, and reviewability. With respect to stake-in-the-outcome, in the court's view the only harm alleged by the Sierra Club was that "the proposed course of action indicated by the Secretaries does not please its officers and board of directors and through them all or a substantial number of its members." 433 F.2d at 30. This the court considered insufficient:

> "We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority." *Id.*

In order to satisfy the court's requirement of "direct interest," the Sierra Club would have been required to allege that "its property will be damaged, that its organization or members will be endangered or that its status will be threatened." *Id.*

With respect to the zone-of-interests standard, the Ninth Circuit, while viewing this Court's language as "not entirely clear," considered that "it does not establish a test separate and apart from or in addition to the [stake-in-the-outcome] test." *Id.* at 31. Accordingly, it did not address itself separately to the zone-of-interests inquiry. It was similarly silent with respect to reviewability.

We demonstrate in the following sections that the Court of Appeals' application of the stake-in-the-outcome test was both contrary to sound precedent and grounded in unwise policy considerations, that the Sierra Club's interests are clearly within the zone of interests to be protected by the statutes in question, and that the administrative actions challenged by the Sierra Club are plainly reviewable.[17]

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[17]We recognize that some commentators have suggested that the *Data Processing* standards be reconsidered or modified so as further to expand access to the courts. *E.g.*, K. C. Davis, *Administrative Law*

B. Stake in the Outcome

Whether the Sierra Club has alleged a stake in the outcome of this case sufficient to survive the constitutional challenge to its standing depends upon the circumstances in which organizations and associations may sue in the federal courts. Although this Court has not had the occasion to consider what allegations might be required to demonstrate the stake of groups like the Sierrra Club (or the Environmental Defense Fund), which seek to litigate issues of importance to the general public, it has laid a solid foundation for such consideration, upon which the lower courts have erected an equally solid structure.

Flast made clear that the function of the stake-in-the-outcome standard is to limit the activity of federal courts to the resolution of disputes between parties with adverse interests. This, then, is the goal that must be served in applying the stake-in-the-outcome test to "public-interest" organizations. The position of the court below—that such an organization can have no stake unless it alleges some form of traditional private harm, such as property damage—seems to us unnecessarily restrictive precisely because it excludes from the courts those whose presence may well be the best assurance of adverseness. To be sure, not all groups in all circumstances are proper parties to request an adjudication of a particular issue. But in order to sort the proper from the improper, one must first recognize that *some* organizations *can* have a sufficient stake in the outcome even without alleging some private economic harm.

In our view there are three additional circumstances in which an association can demonstrate a sufficient stake for

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Treatise—1970 Supplement, §§ 22.00-22.00-5, at 702-27 (1971); Jaffe, *Standing Again*, 84 Harv. L. Rev. 633 (1971). And see the dissenting opinion of Mr. Justice Harlan in *Investment Company Institute v. Camp*, 39 U.S.L.W. 4406, 4413 (U.S., April 5, 1971). We adhere to the *Data Processing* framework, however, because we do not consider it necessary to depart from its standards in order to sustain the petitioner's standing in this case.

standing purposes. First, the organization's own established interests may be injured in fact by the challenged actions. Second, the organization may be the authorized representative of the interest of its members, who are themselves among the class of persons injured or affected by the challenged actions. Third, the organization may serve as a responsible and representative spokesman for the interests either of the affected public or, if the injury is more generalized, of the public at large. The courts that have considered the standing of "public-interest" organizations have, with near unanimity, applied one or more of these standards. That this approach has neither opened the door to hundreds of obstructive litigants nor fostered collusive or hypothetical lawsuits speaks persuasively to its soundness.

We set forth below the detail of each alternative and explain why in our view the Sierra Club in the circumstances of this case satisfies the requirements of each. We conclude by commenting briefly upon the policy considerations occasionally cited in support of a restrictive rule that would bar "public-interest" groups from the federal courts.

1. *Injury to the organization's established interests.* The traditional means of demonstrating a sufficient stake in the outcome has been for the complainant to allege that he has suffered "injury in fact." *E.g., Investment Company Institute v. Camp,* 39 U.S.L.W. at 4406-07; *Data Processing,* 397 U.S. at 152; *Flast,* 392 U.S. at 106; *Baker v. Carr,* 369 U.S. at 208; *Barrows v. Jackson,* 346 U.S. at 256. Courts have, of course, always taken cognizance of direct injury to the financial or proprietary interests of organizations, and have seldom had difficulty finding a sufficient stake in the outcome even where the injury was indirect or the interest non-economic.[18] This was recognized explicitly in *Data*

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[18] *NAACP v. Button,* 371 U.S. 415, 428 (1963) (organization had standing to challenge a statute that would have curtailed its activities in sponsoring and encouraging litigation in civil rights cases); *Pierce v. Society of Sisters,* 268 U.S. 510, 531 (1925) (private school had standing to challenge a state statute requiring all parents to send

Processing, which left no doubt that the injury sufficient for purposes of standing may affect "'aesthetic, conservational, and recreational' as well as economic values." 397 U.S. at 154.[19]

This Court has not to our knowledge expressly considered the problem presented here—whether an organization alleging that its established non-economic interests are adversely affected by agency action (and not that it will suffer financial damage or that its activities will be directly curtailed) is sufficiently injured to satisfy the stake-in-the-outcome test. But we cannot, by reference to the defined objectives of the standing requirement, see any justification for the rule adopted by the Ninth Circuit that such injury is necessarily insufficient. To the contrary, all indications are that if the harm ensures a truly adverse proceeding it is enough, even if it affects non-economic values. That those values are held by an association rather than by an individual should,

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their children to public schools, since "enforcement of the statute would seriously impair, perhaps destroy, the profitable features of [the school's] * * * business and greatly diminish the value of their property"); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 459 (1958) (petitioner had standing to contest a state court order requiring production of its membership lists, partly because the association itself, if compelled to produce the lists, might well suffer indirect financial injury "through diminished financial support and membership").

The court has, of course, frequently conferred standing upon *individuals* whose injury was non-economic. Thus, for example, parents of children attending public schools had standing in *Zorach v. Clauson,* 343 U.S. 306 (1952), to challenge the constitutionality of New York's "released time" program. The alleged impairment of plaintiffs' votes by malapportionment of a state legislature was injury enough in *Baker v. Carr,* 369 U.S. at 207-08. And in *Henderson v. United States,* 339 U.S. 817, 823 (1950), a passenger was entitled to contest the legality of Interstate Commerce Commission rules permitting racial segregation in railroad dining cars.

[19]The opinion also states as a general proposition that "standing may stem from [non-economic harm] * * * as well as from the economic injury on which petitioner relies here." 397 U.S. at 154.

we believe, make no difference. A court must, of course, be satisfied in the case of an association that its values are deeply held and not manufactured for the purposes of litigation, but that can be accomplished by requiring the organization to show, by reference to its activities and conduct, that its interests are established and demonstrated.

A number of lower courts have taken precisely that approach, including perhaps most prominently the Second Circuit in its *Scenic Hudson*[20] decision, which has served as the cutting edge of the developments in this area and which was cited with evident approval by this Court in *Data Processing*, 397 U.S. at 154. A brief survey of these cases will illustrate the factors that have been viewed as significant in determining whether a group's interests are sufficiently demonstrated.

In the groundbreaking *Scenic Hudson* case an association of "conservationist organizations" and three affected towns sought review of an FPC order granting approval of a pumped storage hydroelectric project on the Hudson River. The FPC contended that these organizations had no standing to obtain review because they made "no claim of any personal economic injury resulting from the Commission's action." 354 F.2d at 615. The Second Circuit, after noting that the project was to be located "in an area of unique beauty and major historical significance" and that the Federal Power Act requires the FPC to take account of "the aesthetic, conservational, and recreational aspects of power development," held that "those who by their activities and conduct have exhibited a special interest in [aesthetic, conservational, and recreational values] * * *, must be held to be included in the class of 'aggrieved' parties" under the Federal Power Act. *Id.* at 613, 616.

Though the court remarked that one of Scenic Hudson's constituent organizations would have suffered a traditional

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[20] *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

economic loss as well (inundation of its trailways), the thrust of the opinion was not thereby weakened. Indeed, its strength became almost immediately apparent. The Second Circuit's view—that a demonstrated interest in conservation may be sufficiently injured for standing purposes by agency action that infringes that interest—was extended beyond the confines of the Power Act in *Road Review League v. Boyd*, 270 F.Supp. 650 (S.D. N.Y. 1967). The court held that a town, a local civic association of residents, and a "non-profit association which concerns itself with community problems, primarily those involving the location of highways" [270 F.Supp. at 652] were "'aggrieved' by agency action which allegedly has disregarded their interests" [*id.* at 661]—namely, the Federal Highway Administrator's approval under the Federal Highways Act of a route alignment for an interstate highway.

The District Court recognized that its holding amplified *Scenic Hudson* in two important respects: (1) The Federal Highways Act, unlike the Power Act, had no special "persons aggrieved" provision. As to this, the court could "see no reason why the word 'aggrieved' should have a different meaning in the Administrative Procedure Act from the meaning given to it under the Federal Power Act." *Id.* (2) The plaintiffs in *Road Review League* had brought an independent court action, whereas the petitioners in *Scenic Hudson* had sought review of an administrative decision in a proceeding to which they had been parties. As to this distinction, the court observed that the plaintiffs had actively participated over the course of four years in informal attempts to secure an administrative determination favorable to their interest. The court thus stated that if its decision was an extension of *Scenic Hudson* "it is an extension which I believe to be warranted by the rationale of that decision." *Id.*

The Second Circuit itself, in its most recent treatment of the issue, expressly approved the *Road Review League* reading of *Scenic Hudson*. *Citizens Committee for Hudson*

Valley v. Volpe, 425 F.2d 97, 104 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970). In *Citizens Committee*, the U.S. Army Corps of Engineers had issued a permit authorizing New York State's Department of Transportation to effect the dredging and filling of a portion of a six-lane highway. Suit was brought by the Sierra Club, the Citizens Committee (an unincorporated association of citizens who resided near the proposed highway), and the Village of Tarrytown (through which the highway would pass) to enjoin the issuance of any permits or the commencement of any construction in the absence of congressional consent and approval of the Secretary of Transportation as required by the Rivers and Harbors Act and the Department of Transportation Act. The District Court granted the relief sought, and the defendants on appeal raised the issue of standing.

Dealing first with the Sierra Club and the Citizens Committee, the Court of Appeals observed that they

> "made no claim that the proposed Expressway or the issuance of the dredge and fill permit threatened any direct personal or economic harm to them. Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area immediately threatened with drastic alteration, claiming that they were 'aggrieved' when the Corps acted adversely to the public interest." 425 F.2d at 102.

Both the Citizens Committee and the Sierra Club, which had "a history of involvement in the preservation of national scenic and recreational resources," had established the strength of their interest in conservation and the genuineness of their concern with local natural resources by vigorously presenting their views to state and federal officials. On these facts the court considered that the organizations would be injured by the challenged actions, which allegedly infringed their interests.

> "These plaintiffs, alleging that the Corps and the Secretary of the Army ignored their environmental concerns are 'aggrieved' * * *." *Id.* at 104.

This view is by no means limited to the Second Circuit. In *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, 2 BNA Env. Rep. Cas. 1422 (4th Cir. 1971), the plaintiff, "a non-profit membership corporation dedicated to preserving natural, scenic and historic areas in the West Virginia Highlands," sought an injunction against mining and timber-cutting in part of the Monongahela National Forest. The Fourth Circuit, affirming the District Court's grant of a preliminary injunction, took note of the Conservancy's modest size (200 members) but intensive activity and vital interest in the Forest and in the particular area at issue (as reflected in its newsletters, field trips, hikes, meetings, and scientific studies). It held with respect to standing that the Conservancy's aesthetic, conservational, and recreational interests would be injured by the mining and timber-cutting activities.

In the recent case of *Izaak Walton League v. St. Clair*, 313 F. Supp. 1312 (D. Minn. 1970), the District Court was faced with a nearly identical issue. The plaintiff, an environmental organization with "a long history of activity in conservation matters and natural resource preservation," sought to enjoin federal approval of drilling and exploring operations for minerals in a portion of the National Wilderness Preservation System in Minnesota. In rejecting the defendants' contention that the Izaak Walton League lacked standing, the court reasoned that, since the League had "been active for many years in urging congressional and other legislative action" and had been directly and deeply involved in securing congressional establishment of the wilderness lands in question, there could be no doubt "that plaintiff actively will pursue in an adversary way the prosecution of this suit * * *." 313 F. Supp. at 1316. Moreover, since the League "is not a 'johnny-come-lately' or an *ad hoc* organization and its interest in the wilderness movement is continuing, basic and deep," it is injured in fact by action that disregards its aesthetic, conservational, and recreational interests, *id.* at 1317, notwithstanding that it owns no land and asserts no

claim of mineral rights in the wilderness area, and that it has no economic interest in the outcome of the suit, *id.* at 1316.

Other courts, with the exception of the Ninth Circuit, are in accord with this approach. See, *e.g.*, *Environmental Defense Fund, Inc. v. Corps of Engineers*, 2 BNA Env. Rep. Cas. 1260, 1280-84 (E.D. Ark. 1971); *Crowther v. Seaborg*, 312 F.Supp. 1205, 1216 (D. Colo. 1970); *Parker v. United States*, 307 F.Supp. 685, 687 (D. Colo. 1969); *Delaware v. Pennsylvania N.Y. Central Transp. Co.*, 2 BNA Env. Rep. Cas. 1355, 1358-60 (D. Del. 1971); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 2 BNA Env. Rep. Cas. 1173, 1174 (D.D.C. 1971); *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F.Supp. 238, 245 (M.D.Pa. 1970). Indeed, until this case was decided by the Ninth Circuit and followed in *Alameda Conservation Ass'n v. California*, 437 F.2d 1087 (9th Cir.), *cert. denied*, 39 U.S.L.W. 3455 (April 19, 1971), that Circuit's decision in *State of Washington Dep't of Game v. FPC*, 207 F.2d 391 (1953), *cert. denied*, 347 U.S. 936 (1954), was a leading case holding that environmental organizations may be aggrieved by action that disregards their interests.[21]

The *Washington Game* case and the more recent *Scenic Hudson* line of decisions represent a sound approach to organizational standing. They recognize that organizations can have a vital stake in the outcome of a controversy involving their interests and they focus upon whether those interests are sufficiently established and demonstrated to ensure that the dispute "will be presented in an adversary context." *Flast*, 392 U.S. at 101. The considerations that enter into that judgment may include the age of the organization, its resources, the consistency of its expressed

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[21] The Washington State Sportsmen's Council, together with two state agencies, were each held to be aggrieved by an FPC approval of dam construction on the Cowlitz River, because the project would "destroy fish which they, among others, are interested in protecting." 207 F.2d at 395. The case was relied upon by the Second Circuit in *Scenic Hudson*, 354 F.2d at 616.

interests, its participation in the formal or informal administrative proceedings that led to the dispute, its activity in or near the lands involved, its vigorous participation in other controversies of a similar nature, and any other conduct that reflects the group's commitment to its asserted interests. These factors are, of course, appropriately assessed by the District Court at the time the issue is raised or by the reviewing court upon the facts of record. If that assessment persuades the court that "the question will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor" [*id.* at 106], the plaintiff should not be refused access to the courts because of an artificial and restrictive requirement that there be some more "direct" or "personal" injury.

The Ninth Circuit applied precisely such a restrictive test and concluded that the Sierra Club—one of the nation's oldest and largest conservation groups, one of whose traditional concerns has been with the lands of the Sierra Nevada Mountains—"does not allege that it is 'aggrieved' or that it is 'adversely affected' within the rules of standing." 433 F. 2d at 32. What is meant by this is not entirely clear from the opinion. On the one hand, the court stated that the Sierra Club would have standing only if its property were damaged or its status threatened. *Id.* at 30. On the other hand, it suggested, by way of distinguishing the Second Circuit's decision in *Citizens Committee*, that the case would have been a different one had the plaintiff been a "local conservationist organization made up of local residents and users of the area affected * * *." *Id.* at 33. We doubt, however, that the latter suggestion represents the court's holding,[22] and our doubt has been confirmed by the Ninth

[22]We base this view on two considerations. First, if the opinion meant to imply that the Sierra Club is not precisely such a "local" organization, it would be founded on a factual misconception. With respect to the Sierra Nevadas, we are aware of no more appropriate "local" group made up of persons who use and enjoy the area than the Sierra Club. Second, if it meant to invoke a principle of formality

Circuit itself in an opinion written by the same judge some four months after the decision in *Sierra Club*.

In *Alameda Conservation Ass'n v. California*, 437 F.2d 1087 (1971), *cert. denied*, 39 U.S.L.W. 3455 (April 19, 1971), the plaintiff was, so far as one can tell from the opinions, precisely the kind of local group referred to in *Sierra Club*. It was made up of users of the San Francisco Bay and residents of the area, who alleged that the challenged actions would destroy fisheries and wildlife from which they personally benefited, and would seriously harm the Bay's flushing characteristics causing deleterious climatic effects. The organization alleged that its purpose was to protect the public interest in the waters of San Francisco Bay. The court, though it allowed certain individual plaintiffs to sue, held that the organization lacked standing because "it is not hurt in any practical way which entitles it to call upon the courts for redress or protection." 437 F.2d at 1090. As in *Sierra Club*, the group had not asserted that "any of its rights or properties are being infringed." *Id.* at 1089. The rationale of the court's view, as stated concisely in two paragraphs, is that organizations *qua* organizations are not proper parties to raise "public interest" issues because that would be destructive of good government:

> "Standing is not established by suit initiated by this association simply because it has as one of its purposes the protection of the 'public interest' in the waters of the San Francisco Bay. However well intentioned the members may be, they may not by uniting create for themselves a super-administrative agency or a *parens patriae* official status with the capability of over-seeing and of challenging the

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that would exclude the Sierra Club not for lack of injury but for neglect formally to plead the details of its members' outdoor activities, the obviously appropriate course would have been a form of remand that would have permitted correction of the technical omission by amendment to the complaint. Certainly there could be no purpose in preparing a lengthy opinion on the silent assumption that the error could not be remedied.

> action of the appointed and elected officials of the state government. Although recent decisions have considerably broadened the concept of standing, we do not find that they go this far.
>
> "Were it otherwise the various clubs, political, economic, and social now or yet to be organized, could wreak havoc with the administration of government, both federal and state. There are other forums where their voices and their views may be effectively presented, but to have standing to submit a 'case or controversy' to a federal court, something more must be shown." *Id.* at 1090.

We will have more to say later about this view. It is enough for now to note that the Court of Appeals' holding in *Sierra Club* evidently rests on an antagonism to organizational litigants, not on a factual judgment that the Sierra Club was not a "local" organization.

We have already shown that the court's restrictive view of injury cannot be squared with its own 1953 ruling in *Washington Game* or with recent authority from other circuits. It should also be clear that, had the Sierra Club's allegations been measured against the standards established by that recent authority, sufficient injury would have been shown. The Club asserted that it has an established and enduring interest in conservation of public lands generally and a special interest in the Sierra Nevada Mountains (two propositions that are beyond factual dispute) and that its interests would be vitally affected by the actions challenged. Under *Scenic Hudson* and its progeny, this would have been enough to satisfy the standard of injury in fact.

2. *The organization as representative of its members' interests.* Having shown that an environmental organization can demonstrate its stake in the outcome of a controversy by showing that its established interests have been contravened, we turn next to an alternative means to the same end. Regardless of whether an organization has suffered injury to its established interests, it may serve as the authorized representative of the interests of its members, all or some

of whom may themselves be aggrieved by the challenged action. This principle is settled; it has been applied by this Court in the context of trade association and by other courts in a variety of circumstances including environmental litigation.

In *National Motor Freight Traffic Ass'n v. United States*, 372 U.S. 246 (1963), the appellants were "associations of motor carriers, authorized under 49 U.S.C. § 5b, [who] * * * perform significant functions in the administration of the Interstate Commerce Act * * *." 372 U.S. at 247. The District Court had dismissed their action to set aside an ICC order both on standing grounds and on the merits, and the Supreme Court affirmed by *per curiam* order. In denying a subsequent petition for rehearing, the Court made clear that its affirmance was based solely on the merits issue:

> "We disagreed that appellants lacked standing to challenge the Commission's order in the District Court.* * * Since individual member carriers of appellants will be aggrieved by the Commission's order, and since appellants are *proper representatives of the interests of their members*, appellants have standing * * *." *Id.* (emphasis added).[23]

The principle that an organization whose members are aggrieved by administrative action has standing as their representative to challenge that action is not limited to associations "authorized" under the Interstate Commerce Act.

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[23]See also *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 156 (1953), which conferred standing on an "association of non-profit rural electric cooperatives" whose members had "a substantial interest in the development of low-cost power" at a particular site, and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-59 (1958), which permitted an association to represent its members' interests in resisting an order requiring disclosure of membership lists. The Court in *NAACP* stated:

> "Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical. The Association * * * is but the medium through which its individual members seek to make more effective the expression of their own views."

The District of Columbia Circuit, in a series of decisions, has conferred standing upon a labor organization representing the interests of government employees in a work-related dispute,[24] a national trade association for the coin-operated laundry industry representing the interests of its members concerning a Labor Department ruling on the applicability of the Fair Labor Standards Act,[25] and citizens associations representing the interests of their members in challenging the issuance of liquor licenses to neighborhood restaurants.[26]

These decisions establish a sound approach to the standing of organizations asserting their members' interests. If all or some of the members[27] are aggrieved by the allegedly unlawful actions, then an association organized to promote the interests of its members and serving as an authorized spokesman for those interests has a sufficient stake in the outcome of a controversy involving the members' interests. The only questions before a district court would thus be (1) whether some of the members are aggrieved, (2) whether

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[24] *Lodge 1858, American Federation of Government Employees v. Paine*, 26 Pike & Fischer Ad. L.2d 750, 765-67 (D.C. Cir. 1970) (opinion of Robinson, J.); *United Federation of Postal Clerks v. Watson*, 409 F.2d 462, 469-71 (D.C. Cir.), *cert. denied*, 396 U.S. 902 (1962). In both cases, the court noted that the organization was recognized as the exclusive representative of the employees, that it was charged by Executive Order with representing the interests of all employees without discrimination, that it had the responsibility for consulting with the employer on matters such as those in issue, and that the members of the group were themselves affected by the challenged determination.

[25] *National Automatic Laundry & Cleaning Council v. Schultz*, D.C. Cir., No. 22,692 (March 31, 1971), slip opinion at 5-8.

[26] *Citizens Association of Georgetown v. Simonson*, 403 F.2d 175, 176, (D.C. Cir. 1968); *MacArthur Liquors, Inc. v. Palisades Citizens Association*, 265 F.2d 372, 374 (D.C. Cir. 1959).

[27] The association's "standing does not depend on any unanimity of interest * * * on the part of all its members." *Watson, supra* note 24, at 470 n. 30.

the organization was formed to represent the pertinent interests of its members, and (3) whether it is the authorized spokesman for its members' interests. Where all three questions may be answered affirmatively, the organization should not be denied standing on the ground that it lacks a stake in the outcome, for it would be "artificial and pointless to cut off its representative functions at the courthouse door." *United Federation of Postal Clerks v. Watson*, 409 F.2d 462, 470 (D.C. Cir.), *cert. denied*, 396 U.S. 902 (1969). In this latter repsect, there would ordinarily be no need for an affirmative showing by the organization that it is authorized to represent its members' interests. "[A]bsent evidence to the contrary, it is reasonable to assume that the representative speaks effectively for his constituency." *Id.* Of course, if doubt is raised either by the opposing party or otherwise the court may require an appropriate showing of authorization or may order that the members be notified of the action and be given an opportunity to disassociate themselves from it.[28]

The Ninth Circuit in its opinion below did not address itself directly to the Sierra Club's capacity to represent the interests of its members. The court seemed to suggest, however, by referring to the Club's failure to allege that its members would be injured, 433 F.2d at 30, 33, and by distinguishing other decisions on the ground that they involved local groups made up of persons affected by the administrative action, *id.* at 33, that such representative standing might be appropriate in certain circumstances. If that is the holding of the decision below—that is, if the Sierra Club was denied standing because its members were not aggrieved rather than because it simply could not represent its members' interests—then we believe that the court misapplied a

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[28]Cf. *Environmental Defense Fund, Inc. v. Corps of Engineers*, 2 BNA Env. Rep. Cas. 1260, 1283 (E.D. Ark. 1971), where the court required the plaintiff environmental organizations "to notify their members of the pendency of this action and of the legal positions being taken * * *."

sound principle to the facts before it. If, on the other hand, the decision below reflects a disinclination to permit associations to speak as litigants for the interests of their members, then we believe the court embraced a principle that impedes instead of furthering the prime objective of the stake-in-the-outcome requirement, namely, ensuring an adverse presentation. If the interests of aggrieved persons are in fact properly represented, the representative may be expected to present the dispute in the same adversary context as would the individuals themselves.

Here as in the case of injury to an organization's interests, the Ninth Circuit's subsequent opinion in *Alameda Conservation* illuminates the holding of the court below. By citing this later decision we do not mean to suggest that it is before this Court for review. Rather, we consider that an opinion written so soon after the one in this case by the same judge and on so similar a point provides some help in understanding the earlier one. If we are right in that assumption, it seems clear from *Alameda Conservation* that the result would have been no different in this case if the Sierra Club had alleged injury to its members. The court in *Alameda Conservation* denied standing to a local organization seeking to assert its members' interests in preserving San Francisco Bay, where those members' "health and the enjoyment of their property [were] materially affected by the filling of the bay." 437 F.2d at 1089. The reasoning reveals a rather well defined resistance to allowing groups to assert the interests of their members:

> "The suggestion is that the corporation may assert its members rights because it is in the best position to do so. Moreover, the Association's 'nexus' with its members gives it standing to appear as their representative in federal courts, it is asserted.
>
> "* * * The primary purpose in forming a corporation in most instances is not to give the corporation an interest in the member's real property or other assets. Just the opposite. It is to be sure that the member's property interests will not be jeopardized

> by his associations with others. It is not to create a nexus but to disconnect the member from the organization as to property, assets or liability. Nor does the fact that the corporate purposes are akin to those of its members make the corporation the authorized spokesman for the purpose of asserting its members constitutional rights. * * *If the association here had a recreational operation which it conducted and which the defendants interfered with, it could assert it; if its physical surroundings were made unattractive, this aesthetic infringement would create standing; or if it operated a conservation program, an interference with that operation would establish standing. The point is that the standing necessary to assert as a litigant must be that of the litigant." *Id.* at 1090-91.

This view is, in our judgment, wholly inconsistent with the reasoning underlying the decisions of this Court and other courts that have conferred standing upon organizations as representatives of their members, and we believe it should be rejected. If the proper standards were applied, the Sierra Club surely would qualify as spokesman for the interests of its members. Indeed, it has been granted standing in precisely that role by the District Court in Alaska. *Sierra Club v. Hardin*, 2 BNA Env. Rep. Cas. 1385, 1389-93 (1971). That was an action to enjoin the sale of timber located in the Tongass National Forest brought by the Sierra Club, the Sitka Conservation Society (an Alaska nonprofit conservation organization), and an individual who conducted expeditions into portions of the forest lands affected. The Sierra Club had 300 to 400 members in Alaska, 80 of whom lived in the area adjacent to the timber sale area and enjoyed its scenic and recreational aspects. Sitka had only 20 to 40 members, all of whom resided in Sitka more than 28 miles from the sale area but some of whom on occasion used the sale area for their personal enjoyment. The District Court, having granted the defendant's motion to designate the suit a class action, considered with care the question of standing. It held (1) that "the

aesthetic, recreational, and conservational interests of local members of both organizations who utilize and enjoy the sale area are directly affected by the Secretary's decision," (2) that although the members had not formally authorized the organizations to prosecute the actions in their behalf, none had asked to be excluded from the class, and (3) that both organizations therefore "have standing to assert the * * * interests of local members and users who are directly affected * * *." *Id.* at 1392.[29]

There is nothing in the present record to raise any doubt that the Sierra Club was formed to assert the aesthetic and conservational interests of its members, or that it is the authorized representative of those interests. And while the complaint was silent as to the activities of the Club's members (evidently because it considered its own interests injured sufficiently for standing under the *Scenic Hudson* authorities), it did make reference to the sizable membership in the San Francisco Bay area and it has on brief to this Court represented the obvious facts concerning the outdoor activities of those members.[30] Moreover, the affidavit of the Club's staff director (A. 25-40) and the attached exhibits (A. 41-158), all of which were before the District Court, evidence the membership's concern for the future of the Mineral King Valley. In these circumstances we do not see that any purpose would be served at this stage by putting the petitioner to the formality of returning to the District Court for an opportunity to make a technical amendment to the pleadings. Even if this were the only ground upon which to base a conclusion that the Sierra Club has the necessary stake in the outcome, and we do not believe it is,

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[29] Although the case was decided after the Ninth Circuit's decision in *Alameda Conservation*, the District Court felt free to reach its conclusion because, by designating the suit a class action, it had foreclosed the possibility of inconsistent verdicts, a possibility that had concerned the concurring judge in *Alameda Conservation*. 2 BNA Env. Rep. Cas. at 1392.

[30] Petition for Certiorari, p. 14.

the Court could appropriately treat the facts as if they had been more fully alleged in the complaint. Thereafter, when the case returns to the District Court either for trial on the merits or for entry of final judgment, the petitioner could seek permission under Rule 15(a) of the Federal Rules of Civil Procedure to make the conforming amendment.

3. *The organization as spokesman for the public interest.* We come now to yet a third way for an organizational litigant to demonstrate its stake in the outcome of a controversy: it may, in appropriate circumstances, serve as a responsible and representative spokesman for the interests of the concerned or affected public or, if the harm is sufficiently generalized, of the public at large. This stems from the recognition that in some situations the injury that flows from a challenged action, while perhaps directly aggrieving a few individuals, truly affects a broad class of persons no one of whom may have sufficient concrete injury to sue on his own behalf. In those circumstances, the interests of that broad class may appropriately be represented by an association whose demonstrated commitment to the principles asserted ensure that it will present a concrete dispute in an adversary context. This is not, of course, to suggest that there can be only one representative of the public interest, or even that there can be only one public interest, in a particular set of circumstances. With respect to the Mineral King project, for example, there may be several publics with conflicting interests—such as the conservation public and the skiing public—and each may have several responsible spokesmen. So long as the interests are clearly defined and shared by members of a relatively broad class of the public, each should be entitled to representation by responsible groups organized to assert those interests.

The starting point for this discussion is the opinion in *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). That case involved a challenge, on grounds of racially and religiously discriminatory broadcasting policy and excessive commercials, to

the FCC's renewal of an operating license for television station WLBT in Jackson, Mississippi. The petitioners before the FCC were the Office of Communication of the United Church of Christ (an instrumentality of the Church, which is a national denomination with substantial membership in WLBT's prime service area), two individual residents of Mississippi (both of whom were civil rights leaders who owned television sets and one of whom resided in WLBT's prime service area), and the United Church of Christ at Tougaloo (a congregation of the United Church of Christ within WLBT's area). All had sought to intervene before the Commission in their own behalf and as representatives of all other television viewers in Mississippi. The FCC denied the petition to intervene on standing grounds, stating that the petitioners were unable to show an invasion of a legally protected interest or an injury that was direct and substantial, and that their injury was therefore no greater than that of the general public.

Rejecting the FCC's view that standing requires an assertion of economic injury or electrical interference, the District of Columbia Circuit held that members of the listening audience have standing to participate in a license renewal proceeding:[31]

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[31] The precise issue before the court was whether the petitioners had standing before the FCC. But the principles discussed in the opinion are broadly applicable to standing generally and were so understood by the court. It observed (359 F.2d at 1000 n.8) that since all parties considered the same standards applicable for standing before the FCC and standing in the federal courts, "we have * * * used the cases dealing with standing in the two tribunals interchangeably." Moreover, the court expressly rejected the Commission's independent argument that the petitioners lacked standing to seek review of the Commission's order. *Id.* at 1007 n.25. A number of cases that have relied on *Church of Christ* have noted that the opinion's significance is not limited to FCC standing. *E.g., Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97, 103 n.4 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970); *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 732-33 (D.C. Cir. 1970).

> "Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience. This much seems essential to insure that the holders of broadcasting licenses be responsive to the needs of the audience, without which the broadcaster could not exist." 359 F.2d at 1002.

This participation may be, indeed may *preferably* be, through "responsible spokesmen for representative groups having significant roots in the listening community." *Id.* at 1005. Such "intervention on behalf of the public is not allowed to press private interests but only to vindicate the broad public interest * * *." *Id.* at 1006.

The court specified two questions that must be answered before a "public interest" group may be granted standing: (1) whether the challenged actions are allegedly inconsistent with the public interest, and (2) whether the complainant has alleged sufficient facts to show that it is a responsible and representative spokesman for that public interest. *Id.* at 1005. Although the court in *Church of Christ* was reluctant to categorize the sort of groups that appropriately could serve as such spokesmen, it did suggest some pertinent guidelines.

> "The responsible and representative groups eligible to intervene cannot here be enumerated or categorized specifically; such community organizations as civic associations, professional societies, unions, churches, and educational institutions or associations might well be helpful to the Commission. These groups are found in every community; they usually concern themselves with a wide range of community problems and tend to be representatives of broad as distinguished from narrow interests, public as distinguished from private or commercial interests." *Id.*

These groups must have a legitimate interest in the proceedings in which they seek to be involved, and they must be

free of a desire only to delay administrative action "for some private selfish reason." *Id.* at 1001.

Church of Christ's "public" was a reasonably circumscribed class of affected persons—the listening audience in WLBT's area. But, as reflected in the decisions that have followed *Church of Christ's* lead, the court's reasoning has obvious application to the full range of "publics," from a small and identifiable group of affected persons to the public at large. In *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970), for example, "five organizations engaged in activities relating to the environment" [428 F.2d at 1095], including EDF and the Sierra Club, sought to compel the Secretary of Agriculture to issue notices of cancellation for all "economic poison" containing DDT and to suspend registration for such products pending cancellation proceedings. Denying the Secretary's motion to dismiss, the Court of Appeals held that the petitioners had standing, that the Secretary's refusal to act was a final order, and that the order was reviewable.

With respect to standing the court noted that the injury complained of was of universal nature.

> "The injury alleged by petitioners is the biological harm to man and to other living things resulting from the Secretary's failure to take action which would restrict the use of DDT in the environment." 428 F.2d at 1096.

The organizations, each of whom had "a demonstrated interest in protecting the environment from pesticide pollution" [*id.* at 1097], were viewed as appropriate spokesmen for the interests of the affected public, *i.e.*, mankind.

> "Like other consumers, those who 'consume'—however unwillingly—the pesticide residues permitted by the Secretary to accumulate in the environment are persons 'aggrieved by agency action within the meaning of a relevant statute.' Furthermore, the consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem." *Id.*

The Second Circuit took a similar view in *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97, *cert. denied*, 400 U.S. 949 (1970), a case we noted above in connection with injury to an organization's established interests. The court, evidently in an alternative approach to the question of standing, held that the plaintiffs, who included the Sierra Club and a local conservation group, could appropriately speak for the interests of the public in preservation of natural resources:

> "We hold, therefore, that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest." 425 F.2d at 105.

Numerous other courts have adopted the *Church of Christ* approach. See, *e.g.*, *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 738-39 (D.C. Cir. 1970) (national and state welfare recipients organizations have standing to represent interests of "class of welfare recipients"); *Environmental Defense Fund, Inc. v. United States Dep't of Health, Education & Welfare*, 428 F.2d 1083, 1085 n.2 (D.C. Cir. 1970) (EDF accorded standing as representative of general public's interest in preservation or restoration of environmental quality); *Environmental Defense Fund, Inc. v. Corps of Engineers*, 2 BNA Env. Rep. Cas. 1260 (E.D. Ark. 1971) (EDF and other environmental groups may represent public interest in Cossatot river and its environs); *Crowther v. Seaborg*, 312 F.Supp. 1205, 1213, 1215-16 (D. Colo. 1970) (organization may represent interests of "all those persons entitled to the protection of their health and all those persons entitled to the full benefit, use and enjoyment of the natural resources of the State of Colorado"); *Delaware v. Pennsylvania N.Y. Central Transp. Co.*, 2 BNA Env. Rep. Cas. 1355, 1359 (D.Del. 1971) (dictum that plaintiffs including civic organization may represent "important public

interests of navigation, environment, ecology, and conservation"); *Powelton Civic Home Owners Ass'n v. HUD*, 284 F. Supp. 809, 826-27 (E.D.Pa. 1968) (association of residents have standing to represent interests of displaced homeowners and of the general public in decent housing for American families); *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F.Supp. 238, 245 (M.D. Pa. 1970) (environmental organization may represent the interests of "present and future generations" in conservation of resources).

The principles of *Church of Christ* have thus been applied in a variety of circumstances, including those in which the challenged action had a direct impact upon certain individuals, who presumably could have sued on their own behalf, but also had a generalized effect upon some broader class of the public. See, *e.g.*, *Powelton Civic Home Owners Ass'n v. HUD*, *supra*. Whether the interests of that broader class are enough to sustain the standing of a representative group is a matter best decided by the district court in light of the facts before it. It should be noted, however, that environmental protection is necessarily a universal concern. Whereas an action affecting the public lands in California may have a direct impact upon those who regularly use and enjoy the lands, it may have a less direct but no less important impact upon those who are merely potential users or who merely "enjoy" the lands though they do not visit them.[32]

The decisions that have applied the *Church of Christ* principles seem to follow, at least implicitly, the two tests identified by the District of Columbia Circuit—namely, that the challenged actions must be prima facie inconsistent with some public interest and that the organization must show it is a responsible and representative spokesman for that interest. The key question, of course, is whether the particular organization before the court is an appropriate one.

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[32] See Darling and Eichhorn, *Man and Nature in the National Parks*, Conservation Foundation, p. 20 (2d ed. 1969), quoted in note 69 *infra*.

The factors that enter into that determination are similar to the considerations discussed above in terms of injury to a group's demonstrated interests. Indeed, many of the cases that accord standing to organizations do so on both grounds—that its own interests are injured and that it represents the concerned public—or on an indistinct mixture of the two. This is because a group that has a clear commitment to values such as environmental protection is likely as well to be representative of the interests of the general public in those values. In addition to the considerations enumerated above—age, local activities, resources, etc.—the courts may consider whether the organization has "roots in the community," whether it has undertaken the burdens of administrative or judicial litigation, and whether the organization may be the only spokesman willing or able to bring the issues before the court. See *Church of Christ,* 359 F.2d at 1004-05; *Citizens Committee,* 425 F.2d at 103.

These standards would surely be met in this case. First, the actions challenged—the allegedly unlawful approval of a mammoth ski resort in Sequoia National Forest and of an access highway through Sequoia National Park—are, if beyond the authority of federal officials, clearly inconsistent with the public interest. While the most directly affected individuals might be a rather circumscribed class, such as users of the park or forest, all citizens have a stake in the lawful management of the nation's public lands. Second, the Sierra Club certainly would qualify as a responsible and representative spokesman for the interests of either of these publics. During its 80 years of existence the Club has built a reputation as an unwavering advocate for conservation and sound maintenance of our nation's forests and parks, and has traditionally shown a special interest in the Sierra Nevada Mountains.[33] Its large, national membership assures it of sufficient resources to present its position vigorously, and gives

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[33]The Sierra Club was, in fact, instrumental in expanding the boundaries of Sequoia National Park. See Pet. Br., p. 30 n.3.

it roots in the community of those concerned about our natural environment. The Club has consistently expressed its views in formal litigation as well as through informal administrative channels. It has shown, by its active efforts to block the Mineral King project at the administrative level (see A. 26) and by its undertaking of this federal litigation, that it is willing to shoulder the burdens of challenging at every step action that it considers unlawful and unwise. Nor has any more appropriate spokesman come forth. Indeed, if the Sierra Club cannot represent the interest of the public in this case, the issues it seeks to raise may never reach the attention of the courts.[34]

The Ninth Circuit did not address itself explicitly to the *Church of Christ* tests for standing, except to distinguish the case evidently on the ground that the public interested in environmental protection, unlike the public interested in sound broadcasting policy, is not entitled to representation by organizations:

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[34] One whose standing is as spokesman for the public interest is commonly called a "private attorney general." The phrase is, however, of much narrower origin, and we have avoided its use in this section of our brief in order to minimize confusion. It evidently was coined by Judge Frank in *Associated Industries, Inc. v. Ickes*, 134 F.2d 694 (2d Cir.), *vacated as moot*, 320 U.S. 707 (1943), a case in which an association of industrial and commercial firms that were substantial consumers of coal were accorded standing to challenge an administrative order increasing the price of bituminous coal. The issue was not whether the plaintiff had a stake in the outcome but whether the Congress had provided for judicial review at the instance of one who was injured but who could show no "invasion of any private legally protected substantive interest of his own." 134 F.2d at 705. The court held that Congress had made such provision in a statute authorizing a "person aggrieved" by the administrative determination to seek review of it. The decision followed this Court's similar holding in *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The *Sanders-Associated Industries* "person aggrieved" doctrine, which was applicable only if there was a "person aggrieved" statute, has, in effect, evolved to the *Data Processing* "zone-of-interests" standard. 397 U.S. at 154.

> "The *United Church of Christ* case, supra, was one of a number of consumer cases. There the FCC had denied to petitioners the right to intervene and, as listeners to the programming of a radio and television station, to present their views in a proceeding to renew the license of that station. In that case as in other consumer cases, the court pointed out that the listeners were the persons 'affected' or 'aggrieved.' They had standing in the same sense that coal consumers were found to have standing to review a minimum price order or that a transit rider had standing to appeal a fare increase." 433 F.2d at 30.

We cannot see that consumers of the scenic beauty and recreational facilities of public lands are less affected by unlawful actions concerning those lands than are consumers of television programming, coal, or public transit. See *Environmental Defense Fund, Inc. v. Hardin,* 428 F.2d at 1096-97. It seems plain that, if the *Church of Christ* approach is to be credited at all, it must have application in the case of conservation litigation.

4. *The Ninth Circuit's fears are unfounded.* The Ninth Circuit's opinions in this case and in *Alameda Conservation* express a clear reluctance to open the courts to groups like the Sierra Club. This reluctance is evidently grounded in several considerations, each of which we believe worthy of brief comment.

Judge Trask, writing for the majority in *Sierra Club* and *Alameda Conservation*, seemed concerned that the normal functions of government might be disrupted if environmental or other organizations were permitted to invoke the jurisdiction of federal courts. Thus, in *Sierra Club,* he stated his view that the Sierra Club's interest was not "sufficient to challenge the exercise of responsibilities on behalf of all of the citizens by two cabinet level officials of the government acting under Congressional and constitutional authority." 433 F.2d at 30. In *Alameda Conservation,* the view was made somewhat more explicit. Organizations were denied standing because:

> "Were it otherwise the various clubs, political, economic or social now or yet to be organized, could wreak havoc with the administration of government, both federal and state." 437 F.2d at 1090.

We are not sure precisely what the court had in mind. To the extent these passages reflect a view that the actions of the Secretaries are in some sense immune from judicial review, we believe the point is answered by the recent decisions of this Court. It is, as we show in a later section, a rare case indeed when administrative action is unreviewable. To the extent the passages reflect a fear that the courts will be inundated by all varieties of litigious organizations, we consider the fear unfounded. The courts have consistently minimized the danger that liberalized standing rules will lead to inundation of the judicial dockets. As the court in *Scenic Hudson* put it:

> "We see no justification for the Commission's fear that our determination will encourage 'literally thousands' to intervene and seek review in future proceedings. We rejected a similar contention in Associated Industries v. Ickes, * * * noting that 'no such horrendous possibilities' exist. Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken." 354 F.2d at 617.

To the same effect, see *Church of Christ*, 359 F.2d at 1006; *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 738-39 (D.C. Cir. 1970). Moreover, granting standing to organizations may well decrease rather than increase the burden on courts, since "[r]epresentation of common interests by an organization * * * serves to limit the number of those who might otherwise" bring actions. *Scenic Hudson*, 354 F.2d at 617.

To the extent the Ninth Circuit was concerned that the lawful activities of the government would be disrupted by obstructive lawsuits, its concern seems misdirected. Conferring standing upon a group asserting legitimate interests

results in interference only with administrative actions of doubtful legality, since if those actions are obviously lawful the government can move successfully for dismissal or for summary judgment. The problem of obstructive lawsuits is appropriately solved not at the courthouse door but in the courtroom itself, for the "doctrine of standing was never intended to provide a shield for official illegality."[35]

Judge Merrill, in his concurring opinion in *Alameda Conservation*, noted an additional concern. In his view, if an action is brought by an organization in circumstances where the "rights of its members are not tendered for adjudication" (437 F.2d at 1097-98), an adverse judgment would not bind the members and therefore would free them to "relitigate so long as imaginative counsel can find an escape from *stare decisis*." *Id.* at 1098. This problem, if it is a problem, is by no means unique to litigation by groups. If an *individual* whose property was to be damaged by the Mineral King project had brought an unsuccessful action to enjoin it, other individuals similarly injured would have been equally free to retain imaginative counsel and to relitigate the issue.

Beyond that, however, the courts are not powerless to deal with the threat of subsequent relitigation. The Court of Appeals for the District of Columbia Circuit recently considered the problem and suggested that where the plaintiff is an association the district court might appropriately entertain the defendant's request that the suit be designated a class action. *National Automatic Laundry & Cleaning Council v. Schultz*, D.C. Cir., No. 22,692 (March 31, 1971.)[36] This is precisely the procedure followed by the

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[35] *Sierra Club v. Hardin*, 2 BNA Env. Rep. Cas. 1385, 1392 (D. Alaska 1971).

[36] The court stated:

> "An organization that is a sufficiently effective spokesman for the interests of its members to assure an adversarial presentation of the issues has standing to present their views even though the action is not brought under Rule 23. * * * But the court that holds itself open to an organization that seeks

court in *Sierra Club v. Hardin*, 2 BNA Env. Rep. Cas. 1385, 1392 (D. Alaska 1971), where in order to foreclose the "threat of harassment through consecutive lawsuits" the court granted the motion of a private defendant to require the plaintiffs to proceed under Rule 23.

In sum, most courts have not let predictions of dire consequences deter them from according standing to those who are likely to present a dispute in an adversary context. The experience of these courts has not been unsatisfactory. While conservation groups and other organizations have frequently been granted standing, we know of no instance of harassing relitigation or of inundation of the dockets or of obstructive lawsuits that can be attributed to liberalized standing rules.

C. Zone of Interests

If, as we believe we have demonstrated, the Sierra Club has a sufficient stake in the outcome of this controversy, it must still pass the second test for standing: "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Data Processing*, 397 U.S. at 153. This formulation was altered in *Investment Company Institute v. Camp*, 39 U.S.L.W. at 4407; but, as we shall explain, the alteration was expansive rather than restrictive. Under either formulation it is clear that the test presents no barrier to the Sierra Club's standing.

1. *The Data Processing formulation.* In both *Data Processing* and *Barlow*, the Court looked to the relevant statutory provisions and their legislative history for some indication of a Congressional intent to protect the interests of the

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access to pre-enforcement review on behalf of its members, has discretion to determine that the Government's request for protection of its interests warrants an insistence that this representative suit be maintained as a class action." Slip opinion, pp. 27-28.

complainants' class. In *Barlow*, the statutes and their history expressly directed the Secretary of Agriculture to protect the interests of the tenant farmers. 397 U.S. at 164-65. While there was no such explicit language in the *Data Processing* statutory materials, "their general policy [was] apparent; and those whose interests [were] directly affected by a broad or narrow interpretation of the Act [were] easily identifiable." 397 U.S. at 157.

The statutes relevant to the claims made by the Sierra Club are those governing the management of the public lands in question. These, like the statutes in *Barlow*, evince a clear intent to protect the interests sought to be protected by the Sierra Club—that is, the public's interest in "conservation and sound maintenance" of the public lands in question. With respect to Sequoia National Park, the relevant statutes are the Act of August 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. § 1; the Act of September 25, 1890, 26 Stat. 478, 16 U.S.C. § 41; and the Act of July 3, 1926, 44 Stat. 820, 16 U.S.C. § 45b. The first, which created the National Park Service as an entity within the Department of the Interior, directs that the Service shall promote and regulate the use of the national parks in conformity with their fundamental purpose,

> "which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

The latter two statutes, which deal specifically with the lands within Sequoia National Park, dedicate the park "for the benefit of the people" and direct the Secretary of the Interior to administer the park to assure

> "the freest use of said park for recreation purposes by the public * * * and for the preservation of said park in a state of nature so far as is consistent with the purposes of sections 45a-45e of this title."

Similarly with respect to the forest lands, the Congress in the Multiple-Use Sustained-Yield Act of 1960, Pub. L. 86-517, 74 Stat. 215, 16 U.S.C. §§ 528-31, declared as its policy that "the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes" (§ 528), and directed the Secretary of Agriculture to "administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom" (§ 529). Among the considerations that must be taken into account, are "the needs of the American people" and the necessity for

> "harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land * * *." § 531(a).

Likewise, the Act of June 4, 1897, 30 Stat. 35, 16 U.S.C. §§ 475, 551, directs that the national forests be administered "to improve and protect the forest" and "to preserve the forests * * * from destruction."

It is plain on the face of these statutes that the Congress intended to protect the conservation interests of the public generally. Any member of the public seeking to protect those interests therefore falls within the "zone of interests." Even if some purpose could be discerned to protect a more limited class of persons, that class would presumably include at least those who have some special interest in furthering the objectives of the legislation. For all the reasons already discussed, the Sierra Club would qualify whether it be regarded as an organization dedicated to the preservation and wise use of the nation's natural resources or as a spokesman for individuals having such interests. There can, therefore, be no doubt that the interests asserted by the Sierra Club are arguably within the zone of interests to be protected by the statutes in question.

2. *The Investment Company test.* Even assuming, as we do not, that the Sierra Club fails to meet the zone of inter-

ests test, it would certainly satisfy the *Investment Company* reformulation of that test. The *Investment Company* Court's characterization of the *Data Processing* holding is revealing: "we concluded that Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury." 39 U.S.L.W. at 4407. The effect of this change, as noted in Mr. Justice Harlan's dissent and as exemplified by the case itself, was at a minimum to make unnecessary a showing that the legislation's *purpose* was to protect the petitioner's interests. It is enough now that its *effect* is to protect those interests. Thus, as Mr. Justice Harlan pointed out:

> "[N]either the language of the pertinent provisions * * * nor the legislative history evinces any congressional concern for the interests of petitioners and others like them in freedom from competition. Indeed, it appears reasonably plain that, if anything, the Act was adopted despite its anticompetitive effects rather than because of them." 39 U.S.L.W. at 4412-13.

The Court nevertheless considered that, since the "Congress did legislate against the competition that the petitioners challenge" (*id.* at 4407), their standing was clear.

We consider it beyond challenge that the statutes referred to above reflect an obvious *purpose* to protect the public's interest in conservation and sound maintenance of the public lands in question, and that it is consequently unnecessary to apply the broader *Investment Company* standard. If that standard were nevertheless used, there could of course be no serious doubt that the acts challenged by the Sierra Club—namely, the approval of rights-of-way, construction, and operation of the access road through Sequoia National Park, and the issuance of permits for the occupation of Sequoia National Forest lands by the Mineral King project—were "arguably legislated against" by the Congress in the pertinent Acts. That is, Congress arguably foreclosed the construction of park roads that are not meant to serve park

purposes and arguably prohibited the issuance of permits for use of forest lands in excess of 80 acres for any one project. And the acts challenged are, as in *Investment Company*, the source of the injury asserted by the Sierra Club.

Under either formulation, then, the second standing test presents no obstacle to the Sierra Club's standing.

D. Reviewability

We come finally to the third *Data Processing* test—"whether judicial review has been precluded." This standard is grounded in the Administrative Procedure Act, 5 U.S.C. § 701(a), which permits judicial review unless some statute precludes it or the challenged action is committed by law to agency discretion.

Little need be said here. This Court in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), established the principle, reiterated in *Data Processing* and *Barlow*, that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress." With respect to statutes that may be thought to preclude such review, a clear command, or a command inferred from the statute's purpose, will suffice. *Barlow*, 397 U.S. at 167. But such an inference requires "a showing of 'clear and convincing evidence' of * * * legislative intent," *Abbott Laboratories*, 387 U.S. at 141, and where the zone of interests test has already been met this showing may be impossible. As the Court observed in *Barlow*, 397 U.S. at 167:

> "The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized."

There has not to our knowledge been any suggestion in this proceeding, nor could there be, that any statute precludes,

on its face or by clear inference, judicial review of the actions challenged.

Though the Government urged in its briefs below that the actions of the Secretaries in approving the Mineral King project and the access road were, in effect, committed to their discretion by law, those briefs were written before this Court's decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 39 U.S.L.W. 4287 (March 2, 1971). *Overton Park* held that the agency discretion provision "is a very narrow exception" to judicial reviewability, restricted to "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 39 U.S.L.W. at 4290. We do not believe, in view of this conclusive statement, that the Government can or will renew its suggestion before this Court.

II

THE PARK HIGHWAY ISSUE

Beyond the issue of standing, of course, are the other issues that the Ninth Circuit resolved against the Sierra Club on the ground that it failed to establish a "strong likelihood" or "reasonable certainty" of ultimate success on the merits. We will deal with only one of these other issues: Whether the Secretary of the Interior acted within the scope of his statutory authority when he sanctioned the use of a 9.2 mile strip of land in Sequoia National Park for construction of an access highway to the proposed Mineral King recreational development to the east of the park.[37]

Respondent's case stumbles at the threshold. The Administrative Procedure Act, 5 U.S.C. § 706 (Supp. V), calls for

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[37] Petitioner has attacked the Secretary's action on the additional grounds that he failed to observe requirements to hold a hearing and to make formal findings on the ecological impact of the road. However, we have confined ourselves to an argument that, whether or not there were any such additional requirements, the Secretary acted in excess of his statutory authority.

judicial review of agency action on the "whole record" compiled by the agency. There is no reason to believe that the record placed before the lower courts, and now before this Court, satisfies that requirement. It consists only of the pleadings, supporting legal memoranda, litigation affidavits, and certain exhibits assembled by the Sierra Club. Whether anything is missing we do not know, but it surely would be remarkable if without discovery the Sierra Club was somehow able to obtain all documents utilized by the Department of the Interior (hereinafter referred to as "the Department") in connection with its road approval action. However that may be, this Court has now made it clear that the complete agency record—while required as a minimum condition—will not be deemed an adequate record for review unless it contains materials that disclose the factual and legal basis for the agency action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 39 U.S.L.W. 4287, 4992-93 (March 2, 1971).[38] Since judicial review is directed at the action itself rather than at later explanations of that action, the record should ideally consist of materials that were actually before the decisionmaker, reflecting his contemporaneous appraisal of the evidence and understanding of his statutory authority. If such materials are not available—and here again we know only that they are not part of the record—the preferable method of securing the right to effective judicial review is to order an examination of the decisionmakers themselves, although the preparation of formal findings may possibly suffice despite the fact that they are retrospective and "thus must be viewed critically." *Id.* at 4293.

If the Secretary's actions with respect to the Mineral King Highway are reviewable at all—and as already noted the holding in *Overton Park* seems to us to dispose entirely of

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[38]In *Overton Park*, as in this case, agency action was challenged by motion for a preliminary injunction. See *Citizens To Preserve Overton Park, Inc. v. Volpe*, 432 F.2d 1307, 1309 (6th Cir. 1970).

any doubt that may have existed on this score—the most that respondent can reasonably expect is an opportunity at a trial on the merits to present a proper record showing the basis of the Secretary's actions.

A. The Statutory Context

The Act creating the National Park Service defined the purposes for which national park lands were to be administered as follows:

> "The service thus established shall promote and regulate the use of the Federal areas known as national parks * * * by such means and measures as conform to the fundamental purpose of the said parks * * * which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1.

This statement of purposes, enacted in 1916, 39 Stat. 535, and reinforced by the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. § 20 (Supp. V)[39]—declaring a policy of Congress

[39]In its entirety this section provides:

> "In furtherance of the Act of August 25, 1916 (39 Stat. 535), as amended, which directs the Secretary of the Interior to administer national park system areas in accordance with the fundamental purpose of conserving their scenery, wildlife, natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations, the Congress hereby finds that the preservation of park values requires that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair these values and so that development of such facilities can best be limited to locations where the least damage to park values will be caused. It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas."

that "public accommodations, facilities, and services" in the parks "shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park areas in which they are located"—obviously confers broad powers on the Secretary of the Interior (hereinafter referred to as "the Secretary"), acting through the Director of the National Park Service (hereinafter referred to as "the Service").[40] But it also expresses, by the clearest implication, a limitation on that power. If land within the national park system, required to be administered under the principles set forth in 16 U.S.C. § 1, is committed by the Interior Department for some purpose other than "to conserve the scenery and natural and historic objects and the wild life therein" or "to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations" (hereinafter referred to as "park purposes"), then in our view the action must be set aside as unauthorized. We doubt that the government seriously disagrees with this view, for at no stage of these proceedings has it pointed to any statutory provision indicating that the park purposes established by 16 U.S.C. § 1 are not exclusive of all others, and its lame suggestion that the Department is free to depart from these purposes in the administration of Sequoia National Park collapses at the touch.

Our contention in connection with the Department's threatened final approval of the 9.2 mile segment of the proposed Mineral King Road (California Route 276) that passes through Sequoia National Park is that such approval would exceed the scope of authority conferred by 16 U.S.C.

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[40]See *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 187 n.1 (1968), for recognition of the legal identity of the Director and Secretary in matters of national park administration.

§ 1.[41] Neither in fact nor in intention would the threatened action serve the dual purposes—preservation and public enjoyment—for which the Congress has decreed that national parks be managed. If some new purpose—in this case the provision of road access to a commercial development outside the park—is now to be added as a guide to land use decisions affecting the national parks, new legislation will surely be needed to accomplish the change. It will be needed, that is, unless the Department can somehow, on an augmented record, sustain a conclusion that on this record it has never shown to be true, much less shown to have been the basis for agency action—that Sequoia National Park, or the experience offered to visitors within the park, will be enhanced by the construction of a modern high-speed road designed to carry 1,200 cars per hour back and forth between the California State highway system on the west and a private year-round resort development on the east.

We note by way of further preliminary comment, not because we think confusion is likely to arise on the point but rather to avoid any possible misunderstanding of our argument, that—with the exception of areas set aside under the provisions of the Wilderness Act of 1964, 16 U.S.C. §§ 1131-36[42]—the Department does not operate under a stat-

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[41] According to the litigation affidavits filed by the government as attachments to its Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Preliminary Injunction (R. 205-27), the Secretary on November 19, 1968, did in fact approve in principle the use of a corridor through Sequoia National Park for the access road. Issuance of the special use permit authorizing actual construction of the park segment of the road, however, was withheld pending agreement on design standards. See McLaughlin Affidavit, ¶¶ 3-6 (A. 181-82); Deffebach Affidavit, ¶ 8 (A. 161-62).

[42] The Wilderness Act defined the characteristics of a wilderness area, 16 U.S.C. § 1131(c), and required the Secretary, within ten years after September 3, 1964, to review "every roadless area of five thousand contiguous acres or more in the national parks," and to report his recommendations on the suitability of such areas for preservation as wilderness. 16 U.S.C. § 1132(c). On those areas thereafter

utory mandate to maintain the national parks in a pure state of nature, free of all intrusions in the form of roads or other public facilities and accommodations. To be sure, the directive in 16 U.S.C. § 1 that national parks be administered so as to "conserve the scenery and the natural and historic objects and the wild life therein" must mean that wilderness values are a constant and inevitably important concern in all national park planning. But at the same time the Department has a statutory responsibility under 16 U.S.C. § 1 to promote the use of the parks and to provide for their enjoyment by the public—with the significant qualification, however, that means selected to this end must be such "as will leave them unimpaired for the enjoyment of future generations." So far as one can divine the legislative intent from the statutory language, the responsibility relating to public use and enjoyment, as qualified, is of coequal rank with the responsibility of conserving scenery, objects, and wild life.

Quite obviously, or so it appears to us, there is tension between these two responsibilities. To the extent that the duty to promote the use and provide for the enjoyment of the parks may require the construction of permanent facilities (such as the roads, lodges, and restaurants commonly found within the parks),[43] the preservation interest cannot

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accorded wilderness status by Act of Congress, "there shall be no commercial enterprise and no permanent road." 16 U.S.C. § 1133(c).

On April 28, 1971 the President transmitted to the Congress a proposal to add 14 areas to the National Wilderness System. 7 *Weekly Compilation of Presidential Documents* 694 (May 3, 1971). One of the proposed additions is an area of 721,970 acres in Sequoia National Park and contiguous Kings Canyon National Park. However, while this area includes portions of Sequoia National Park both to the north and south of the Mineral King Road, it does not include the portion of the park in the immediate vicinity of the roadway.

[43] 16 U.S.C. § 3 authorizes the Secretary of the Interior to grant privileges, leases, and permits, for periods not exceeding thirty years, for the use of land for the accommodation of visitors in the various national parks. Since the government relies on this section as a

be fully served. Similarly, if an area is to be preserved in a natural state, opportunities for public use must to some extent be sacrificed. We are willing to concede that the task of balancing these interests—preservation and use—is the necessary business of national park management. So long as the balance is struck in some reasonable way—that is, so long as account is taken of the relevant considerations and so long as the Department does not entirely foreclose public use for the sake of preservation or destroy in the name of public use the natural values it is obliged to preserve—we are willing to concede that large measures of discretion are available to the Department and that its actions are subject to review only on the narrow grounds prescribed by Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (Supp. V).[44] If, for example, in the Department's considered judgment an additional road were needed in one or another of the parks, either to handle an increasing volume of traffic or to create motor access to a new area within the park, the decision to build—assuming a proper articulation of reasons—could be sustained under the general authority contained in 16 U.S.C. § 1, as implemented by the specific authority relating to park roads contained in 16 U.S.C. § 8.[45]

We agree, then, that the Department administers the national parks under broad guidelines that permit a wide range of choices between competing interests of preser-

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source of authority for the Secretary's road approval action, we will discuss its relevance later.

[44]This provision directs the reviewing court to set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

[45]This provision, about which we also shall have more to say later, authorizes the Secretary to "construct, reconstruct, and improve" roads within the national parks. Like 16 U.S.C. § 3, see note 43 *supra*, this provision simply translates into concrete terms the general authority granted by 16 U.S.C. § 1 to promote the use and provide for the enjoyment of the national parks.

vation and use, and that under some circumstances the construction of roads within the parks is a permissible activity. However, these propositions are of no aid to the Department where, as we contend and will now show, it proposes to authorize the construction of a road not for the purpose of promoting the use and enjoyment of the park itself but for the purpose of providing a high-speed connection between points lying outside the park. Cast in terms of the legal issues on which the reviewing court is directed to focus by the Administrative Procedure Act, 5 U.S.C. § 706(2)(C)(Supp. V),[46] our contention is that the Department is acting outside the scope of its statutory authority when it compromises the preservation of a national park in its natural state for the purpose of providing road access to a commercial development outside the park.

We will first demonstrate that, so far as the matter is disclosed by the record developed in these proceedings, the sole purpose of the proposed California Route 276, including the 9.2 mile segment cutting through Sequoia National Park, is to service the planned Mineral King project in the game refuge area of Sequoia National Forest to the east of the park. We will then deal with the various arguments advanced by the government, and accepted by the Ninth Circuit in its very brief discussion of the road issue, 433 F.2d at 36, in supposed justification of the decision to permit construction within the park—namely, that the proposed road will produce the incidental benefit of increased park visitation by the public, that the proposed road is simply an "improvement" of the existing road, and that the Secretary's authority to administer designated public lands can reasonably be construed as empowering him to grant whatever road permits he sees fit.

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[46] This provision directs the reviewing court to set aside agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

B. Approval of the Road Was Not Based on Any Legitimate Park Purpose

With regard to the purpose of the road, the District Court made the following finding of fact:

> "In the present case the record shows that the proposed highway, so far as it will cut through Sequoia National Park, is designed and intended, not as an adjunct to the National Park, itself, but as a connecting link to route motorists through the park to reach an ultimate destination outside the Park—the proposed, private Mineral King resort-hotel complex in the adjoining forest game refuge area." A. 194.

The materials available to the District Court would have warranted no other finding. On the Sierra Club side, the relevant materials included the complaint for injunctive relief asserting that the construction of the road would destroy or adversely affect scenery and other natural values within the park and that its sole purpose was to service the Mineral King development (A. 8), supported by an affidavit of the organization's Conservation Director asserting that the routing through the park was not a proposal of the Service and in fact had been opposed for several years by the Department (A. 36-37). To the affidavit were annexed numerous exhibits. One of these was a letter from the Acting Assistant Director of the Service stating:

> "It was with great reluctance that Secretary Udall agreed with Secretary of Agriculture Freeman that the access to Mineral King would be by a road through a portion of Sequoia National Park." A. 139[47]

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[47] We think the same reluctance is expressed in the correspondence between these Cabinet officers attached as exhibits to the McCloskey affidavit (A. 136-37). For example, in his letter of October 6, 1968, to the Secretary of Agriculture, the Secretary of the Interior stated:

> "In addition to our desire to minimize the damage to park values by this road, we are concerned about what we have been told concerning the size of the planned Disney develop-

Among the other exhibits were a memorandum from the State Highway Engineer to the California Highway Commission (A. 54-56),[48] with an attached *Report of Route Studies* (A. 57-73), and a *Report on Road to Mineral King* (A. 140-57) prepared by the Clarkson Engineering Company at the request of the Service, all of which clearly identify access to Mineral King as the purpose of the road[49] and all of which conspicuously fail to suggest that park values would be enhanced by the road.

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ment. Will one two-lane road of park standards be adequate, or will Interior later receive a request for another road?"

One reasonable construction of this letter is that the Secretary viewed it as a discharge of his statutory responsibilities if, in the course of approving a project that served no park purpose, he took steps to minimize the consequential damages to park values. Such a construction obviously could not be squared with the mandate of 16 U.S.C. § 1, or with the policy expressed in 16 U.S.C. § 20 that improvements be authorized only when "necessary" for public enjoyment of the national parks.

[48]The segment of road within the park was to be constructed and maintained by the State of California. It was to be part of State Route 276, which was added to the State highway system by a 1965 act of the California legislature. See Deffebach Affidavit, ¶ 3 (A. 161).

[49]The memorandum states (A. 54):

"The highway will provide access to the proposed $35 million recreational complex at Mineral King* * *."

The route study attached to the memorandum states (A. 58):

"The route is to be developed as an all-weather highway to provide access to the proposed $35 million recreational complex at Mineral King* * *."

The report commissioned by the Service states (A. 140, 143):

"The California State Highway Department proposes to build a two-lane, two-directional road across the National Forest and National Park lands to service the proposed recreational developments in the Mineral King Canyon."

* * * * *

"The primary purpose of the proposed highway is to serve the Mineral King development."

On its side, with its Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction, the government submitted several affidavits. The only representative of the Department among the affiants was John McLaughlin, Superintendent of Sequoia National Park. He did not even assert in his affidavit that the proposed highway would serve a park purpose, let alone that such a purpose motivated the approval decision at the time it was made.[50] Nor did he deny that for several years the Department opposed the park routing, or explain the considerations that were taken into account when the routing was approved. To the contrary, he blandly confirmed that park space was to be surrendered to nourish with customers a commercial enterprise outside the park:

> "That in connection with the said development [Mineral King], it is planned that an all-year access highway over 9.2 miles of the land in the Sequoia National Park will be constructed * * *." A. 181[51]

It was only in its legal argument, when it was free to rationalize the Secretary's decision in terms of how it might have been reached rather than how it was reached in fact, that the government introduced the concept of incidental park benefits:

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[50]The affidavit did assert that the construction of the road would be subject to standards "that will protect the National Park values" (A. 182). But this assurance, meaningless in any event in the absence of some definition of the Superintendent's idea of "National Park values," missed the point. The question was not whether the manner of construction would meet design standards relating to roadbuilding within the parks (see *Park Road Standards*, Department of the Interior, National Park Service, May 1968), but whether the road itself would further a park purpose.

[51]Needless to say, the other affiants made no mention of any park purpose. For example, the representative of the California Division of Highways simply asserted that in connection with the Disney project it was "necessary" to build the road. Deffebach Affidavit, ¶ 3 (A. 161).

> "Admittedly, one of the purposes of the new road will be to provide access to Mineral King. At the same time, however, the road will permit greater use of the national park itself and connections in the park will be provided in aid of permitting easier park access. Whether the road will affect the beauty of the park is a question of opinion which must be left to the Secretary's judgment. Certainly, the benefits of the road to the general public justify its construction as well as the conclusion that this national park segment should not be permitted to blockade public use of the adjoining forest lands. As noted previously, Congress has indicated its intention that public lands should be administered under the multiple use principle." R. 219.[52]

We will turn back to this argument in a moment. We simply note here the absence of any allegation that the Secretary's approval decision was taken to secure a park purpose. Rather the allegation is that in the process of serving an unrelated purpose, the road would also permit more intensive use of the park by the public. So far as that kind of analysis goes, of course, a four-lane or a six-lane expressway might well have been better than the proposed two-lane highway. In any event there was obviously no alternative to the District Court's finding that the purpose of the road was not to serve the park but to serve a development on adjoining lands. The Court of Appeals did not disturb this finding. 433 F.2d at 36.

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[52]Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Preliminary Injunction, p. 15 (R. 219).

C. The Secretary's Approval of the Mineral King Highway Cannot Be Justified on the Ground That It Would Create Incidental Park Benefits in the Form of Wider Public Use.

The government's argument in the District Court, quoted above, is just the sort of *post hoc* rationalization of agency action that this Court has consistently rejected as worthless where the action is challenged as being in excess of statutory authority. *Investment Company Institute v. Camp*, 39 U.S. L.W. 4406 (April 5, 1971); *Overton Park*, 39 U.S.L.W. at 4292; *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). The problem with such rationalizations is that by their nature they cannot illuminate the issues that are critically important to judicial review—whether the agency head was aware of the limitations on his statutory authority, whether he misconstrued or disregarded those limitations if he was aware of them, and whether he took account of relevant considerations.

It may well be true, of course, as the government urges, that in this case the Secretary reasonably could have concluded that it was desirable to promote greater public use of the southern panhandle of Sequoia National Park. But so far as can be determined from *post hoc* argument, it may equally be true that the Secretary never even considered the question of public use of the park, or that if he considered the subject at all he deemed it irrelevant, or that while he recognized its relevance he based his road approval decision on other, impermissible considerations, or indeed that he deemed it exclusively relevant and failed to consider preservation values. The same may be said of the government argument that the effect of the road on the beauty of the park "is a question of opinion which must be left to the Secretary's judgment." That is a fine theoretical proposition, but there is no evidence that the Secretary made that kind of judgment, much less what that judgment was or how it figured in the decision. And invoking the "multiple

use principle," while the phrase has the sound of substance and is no doubt meant to convey the impression that the Secretary performed some sophisticated land management function with which the courts ought not to interfere, is mere facade. Under 16 U.S.C. §§ 1 and 20, the economic health of private resorts organized for profit on adjoining lands is not one of the permissible "multiples" in national park planning.

Even if we assumed, which we do not, that there are some circumstances in which unexplained agency action can be defended on the ground that the Secretary self-evidently both understood the limits of his power and applied correct criteria to his decision, thus making inquiry on these issues superfluous, the defense would surely fail in this case. That is so because here, judging from the government's *post hoc* arguments, there are strong indications that the Secretary in fact misunderstood his statutory authority. And judging from other information that is available, there is at least some reason to believe that the Secretary may have reached a different decision on the road had he applied proper criteria.

On the point of the Secretary's view of his statutory authority, the government argued to the District Court that "the benefits of the road to the general public justify its construction as well as the conclusion that this national park segment should not be permitted to blockade public use of the adjoining forest lands." What this amounts to, as we see it, is a claim that the Secretary is free to sell out park interests when it seems to him that some more important public interest would thereby be helped along. If, as we have already suggested and show in more detail later, the Secretary has a legislative warrant to pursue park purposes only, then he has been guilty of a misconception that deprives his action of all validity. Should this contention not prevail, it is clear at a minimum that the Secretary was influenced in his decision by a non-park purpose—the servicing of the Mineral King project—and that fact alone is

sufficiently suspicious to make mandatory a judicial inquiry into his understanding of the limits of his discretion. Adding to the suspicion are the undenied allegations that the Department initially opposed park routing of the road and approved it only "with great reluctance."

A searching probe of the grounds of the Secretary's decision—which *Overton Park* requires—may well prove fruitful in other respects. The crush of vehicular traffic in the national parks is a known and growing problem. A Park Road Standards Committee was appointed by the Director of the Service in 1967 to study the problem, and its 1968 report was submitted to the Secretary with the Director's endorsement.[53] That report reflects considerable hostility to new road construction in the parks, as the following excerpts demonstrate:

> "The single abiding purpose of National Parks is to bring man and his environment into closer harmony. It is thus the *quality* of the park experience—and not the statistics of travel—which must be the primary concern."[54]
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> * * * * *
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> "Although, by an accident of history, the National Park concept reached its development stage at about the same time as did the automobile, there is no everlasting and indissoluble relationship between the two.

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[53]The committee's report is contained in a Department publication, *Park Road Standards*, Department of the Interior, National Park Service, May 1968. The Director's letter forwarding the report to the Secretary appears at page 2 of the publication. It states:

> "If you are in agreement, I would like to make this report available for distribution to interested conservationists and park organizations, and to begin immediately implementation of its recommendations within the National Park Service."

(The pages of the publication are unnumbered, so we have numbered them ourselves designating as page 1 the page displaying the Director's Memorandum of September 8, 1967, appointing the Committee.)

[54]*Id.* at 6.

"But in some ways, the National Parks stand at the same crossroads as do the American cities—some of which seem on the verge of choking on their automobiles. Just as noise, congestion, and pollution threaten the quality of urban life, they have begun to erode the quality of the park experience.

"Many park roads are now congested, particularly around points of great interest; others have a predictably brief grace time.

"There is no reason to expect that the construction of a new park road, by itself, will always relieve this congestion.

"The effective size and capacity of the parks is diminished or expanded by the means of access. Paul Brooks put it this way:

> 'If you are in a canoe traveling at three miles an hour, the lake on which you are paddling is ten times as long and ten times as broad as it is to the man in a speedboat going thirty—every road that replaces a canoe paddle, shrinks the area of the park.'

"In many locations it is impossible to construct roads—of whatever standard—without damaging, enduring scars and obstructing the natural movement of wildlife."[55]

* * * * *

"When the Service is faced with a choice between creating a severe road scar in order to bring visitors to a destination point, or requiring visitors to walk a considerable distance—or considering an alternate transportation system—the decision should be against the road scar.

"It is quite possible that, at this point in the history of National Parks, new roads should be considered the last resort in seeking solutions to park access."[56]

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[55] *Id.* at 6.

[56] *Id.* at 7.

"Inevitably, if the park experience is to maintain its distinctive quality, the numbers of people and their methods of access and circulation will necessarily have to be more closely controlled."[57]

* * * * *

"Today the facts are these: unless an open-end-road road-construction program were to be carried out, the National Parks cannot indefinitely accommodate every person who wants to drive an automobile without restriction through a National Park."[58]

* * * * *

"People need also to appreciate that the purposes of park roads are completely different from those of the Federal and State systems. *Park roads are not continuations of the State and Federal network. They should neither be designed—nor designated—to serve as connecting links. Motorists should not be routed through park roads to reach ultimate destinations.*"[59]

The Director of the Park Service has himself been reliably quoted as saying:[60]

"We have been building roads so visitors can drive 45 to 65 miles an hour. I don't think you can have a quality park experience at that speed.

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[57] *Id.* at 8.

[58] *Id.* at 9.

[59] *Id.* at 9 (emphasis added).

[60] Cahn, *Will Success Spoil The National Parks?*, Christian Science Publishing Society, p. 15 (1968). This publication is a reprint of 16 articles on the state of the national parks that appeared in the Christian Science Monitor between May 1 and August 7, 1968. The series won the 1969 Pulitzer Prize for National Reporting. In a forward to the the publication (page 1), the Director of the Service describes the series of articles as "the most penetrating and thoughtful analysis of the national parks currently available." The publication is regularly distributed by the Service.

> "The parks are not crowded with people, but with autos."

In the light of these statements, the government's argument that the proposed road might have been jusitified on the ground that it would "permit greater use of the national park itself" is even less convincing than usual *post hoc* rationalization. It is bad enough to have a record that is completely silent on the process of decision. But it is something else to have affirmative indications, based on comments by responsible agency officials, that had the Secretary even considered that "greater use" of Sequoia National Park was a proper objective,[61] he might well have concluded that a

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[61] The number of visits made by the public to Sequoia National Park increased from 484,700 in 1954 to 919,300 in 1969. *Public Use Of The National Parks; A Statistical Report 1954-1964*, Department of Interior, National Park Service, p. 10 (1966); *Public Use Of The National Parks December 1969*, Department of Interior, National Park Service (1969), Table 2. We can only speculate about the bearing these figures might have on decisions to construct roads that would subject the park to more intensive public use. However, the materials that were before the District Court do disclose that the ecology of the park is fragile. See particularly Professor Hartesveldt's memorandum *Study of the Possible Changes in the Ecology of Sequoia Groves in Sequoia National Park to be Crossed by the New Mineral King Highway*, dated December 19, 1966 (A. 84-123), in which 45 giant sequoia trees are counted in the drainageways below the proposed road, and in which emphasis is laid on the shallow root structure and vulnerability to toppling because of erosion and soil shifting that is characteristic of these trees. See also the *Report on Road to Mineral King*, prepared by the Clarkson Engineering Company at the request of the Service, which states (A. 142):

> "Obviously, any road construction to present-day standards could not be built through this area without affecting the ecology of the area. Within the road prism (cuts and fills) plant life would, of course, be disturbed and since the top soil for regenerating plant life is sparse, early vegetative cover on cut and fill slopes would be very slow in developing.
>
> "More than that, the road, if primarily based on cut and fill construction, would be a barrier to wild life and visitor movements throughout this area of the park."

road was the wrong way to accomplish that objective, and that a road designed for 50 MPH speeds was a worse way still.[62]

D. The Proposed Road Cannot Be Justified on the Theory That It Is Simply an "Improvement" of an Existing Road.

We turn now to the Ninth Circuit's professed inability to find law or logic "in a contention that a twisting, substandard, inadequate road through 9.2 miles of park is legal but an improved all weather two lane highway along a new but approximately parallel alignment is illegal." In our view, this alchemic reasoning converts wholly irrelevant circumstances into controliing ones.

To the extent that the Ninth Circuit's reasoning may have been inspired by the thought that the new road would perform essentially the same function as the old road, only more efficiently, it involves a premise that is factually incorrect. The old road is a "very narrow" 25-mile stretch from

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[62]It appears that roadbuilding decisions are ordinarily made in the context of a comprehensive plan for management of the park. See Bayliss, *Planning Our National Park Roads And Our National Parkways*, Traffic Quarterly, pp. 419-21 (July 1957):

> "All park development, including * * * the connecting road system, is controlled by the *master plan* for the park. This is a detailed, as well as narrative plan, which defines the theme or basic importance of the park, the areas to be developed and likewise those to be kept free from development, as well as the method of interpreting the important story or features."

This article identifies its author, Mr. Bayliss, as Chief of Parkways, Branch of Landscape Architecture, Division of Design and Construction, National Park Service.

We have found no reference in the record to a master plan for Sequoia National Park. Nor have we found in the record any other indication of an intention to develop the area of the park designated for the proposed road, except in connection with the Mineral King project. Indeed, it may be that a master plan exists showing that the area is among those "to be kept free from development."

Three Rivers on the west to Mineral King on the east, with sharp switchbacks and steep grades, with a surface of oiled dirt or in places only graded roadbed, and with an estimated average daily traffic load of 95 vehicles.[63] It is closed in winter. The proposed road—a 20.4 mile stretch—would connect the same points, but by a routing that would incorporate "very little" of the existing roadbed.[64] It would have two lanes of all-weather paving, covering a total width of 28 feet excluding the "frequent" passing lanes. It would have the capacity to handle 1,200 cars per hour in each direction, and by 1978 the average daily traffic flow in the peak summer months would be 9,850 vehicles. Estimated costs are $22 million for construction and $400,000 for rights of way. Clearly it is intended to do something more than tidy up the old road.

Again a factual misconception is involved if the thought was that the existing road evidenced some earlier judgment, entitled perhaps to continuing respect despite the scope of the planned construction, that the southern area of the park was suitable for mortorized use. The old road existed when Sequoia National Park was created in 1890 (A. 28),[65] and thus it is not the product of a judgment by the Service.

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[63] For a description of the existing road, and the characteristics of the road proposed by the California Division of Highways, see *Report of Route Studies*, pp. 1-4 (A. 58-61). The proposal of the California Division of Highways was the one adopted by the Service (R. 180), even though an alternate routing proposal commissioned by the Service itself recommended that the corridor of the old road for the most part be followed, see *Report on Road to Mineral King* (A. 144-46). We note also that two means of highway access to Mineral King not involving a surface routing across the park—a tunnel underneath the park and a north-south road—were studied but apparently rejected by the Service on account of cost considerations. See *Report of Route Studies*, pp. 8-9 (A. 65-66).

[64] *Report of Route Studies*, p. 4 (A. 61). And see map attached to this report (A. 73).

[65] And see the government's concession on this point at page 12 of its Reply Brief in the Ninth Circuit.

Finally, if the Ninth Circuit's thought was that the existence of a seasonal dirt road somewhere in a park necessarily justifies a 50 MPH highway elsewhere in the park—or in the same place for that matter—there has been a misreading of the relevant statutes. What the authority to improve and construct roads conferred on the Secretary by 16 U.S.C. § 8 must mean, as we will show in a moment, is that the Secretary is free to do anything in the way of roadbuilding that serves the broad aims of national park administration set forth in 16 U.S.C. § 1. That is, whether or not an "improvement" is being made is a question that can only be answered in terms of park purposes. Were it otherwise, the Secretary could convert every dirt road in every park to speedways to meet transportation goals unrelated to preservation or enjoyment of the parks themselves—a result that would be inconsistent not only with 16 U.S.C. § 1 but also with the policy expressed in 16 U.S.C. § 20 that improvements should be restricted to those that are "necessary * * * for public use and enjoyment of the national park area in which they are located."

E. The Park Purposes Defined by 16 U.S.C. § 1 Are Exclusive.

The government's last-ditch argument is that the Secretary's judgment is supreme on questions of national park administration. We are not certain whether the notion here is that the Secretary's power is so sweeping that his actions are unreviewable, or that while reviewable they are never reversible on grounds that the limits of power were exceeded.[66] If the claim is immunity from review, we think

[66] The government argued in the District Court (Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction, p. 14, R. 218):

> "And since the Secretary of the Interior has the authority to administer these public lands, an authority delegated by the Congress, the question of whether the Secretary should or should not grant a particular road permit does not involve any issue of legality or illegality but merely one of discretion—and one where even the Secretary's motive would not create a basis for judicial review."

this Court's recent decision in the *Overton Park* case is a sufficient answer. Moreover, the cases principally relied on by the government, none of which relate to national park matters, all involved federal land-use decisions taken pursuant to reasonable—and, just as importantly, fully articulated—interpretations of the relevant statutes. Rather than burden the text with a discussion of these cases, we have collected them in a footnote along with others that do relate to national park matters but that the government did not cite.[67]

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[67] In *McMichael v. United States*, 355 F.2d 283 (9th Cir. 1965), it was held that the Secretary of Agriculture may designate "primitive areas" within the national forests under a statute, 16 U.S.C. § 551, authorizing him to regulate the "occupancy and use" of such forests. *Duesing v. Udall*, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966), upheld the authority of the Secretary of the Interior—whose action was based on a "thoughtful decision" construing the scope of the discretion conferred on him by Section 17 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181—to refuse applications for oil and gas leases in the Kenai National Moose Range in Alaska. And in both *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964), *cert. denied*, 381 U.S. 904 (1965), and *Willcoxson v. United States*, 313 F.2d 884 (D.C. Cir.), *cert. denied*, 373 U.S. 932 (1963), the discretionary authority of the Secretary of Interior under the Isolated Tracts Act, as amended, 43 U.S.C. § 1171, as implemented by regulations, was found to be broad enough to warrant the refusal to consummate the transfer of public lands after soliciting competitive bids. See also *Thor-Westcliffe Development, Inc. v. Udall*, 314 F.2d 257 (D.C. Cir.), *cert. denied*, 373 U.S. 951 (1963), and *Safarick v. Udall*, 304 F.2d 944 (D.C. Cir.), *cert. denied*, 371 U.S. 901 (1962), sustaining the Secretary's construction of the Mineral Leasing Act.

And see also, relating to national park matters but not cited by the government, *New Mexico State Game Comm'n v. Udall*, 410 F.2d 1197 (10th Cir.), *cert. denied*, 396 U.S. 961 (1969) (upholding the Secretary's authority, under 16 U.S.C. § 3, to order the killing of deer in Carlsbad Caverns National Park in connection with studies relevant to management of the deer population in the park); *Udall v. Washington, Va. & Md. Coach Co.*, 398 F.2d 765 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969) (upholding the Secretary's authority to limit commuter bus traffic on George Washington Memorial Parkway); *Arthur v. Fry*, 300 F.Supp. 622 (E.D. Tenn. 1969) (upholding the Secretary's authority to prohibit the operation of commercial vehicles inside Great Smoky Mountain National Park).

The only conclusion we draw from these precedents—hardly a startling one but one nevertheless that the government appears to doubt—is that, while the operative statutes may create broad fields of discretion, the Secretary has never been regarded as absolute monarch of the public lands within his statutory domain.[68]

We come, then, to the specific provisions that are relevant to a determination of the Secretary's authority to approve the construction of roads in Sequoia National Park, 16 U.S.C. § 1, and, so the government urges, 16 U.S.C. §§ 3 and 8. As we have seen, 16 U.S.C. § 1, 39 Stat. 535, the legislation enacted in 1916 creating the Service, establishes broad policies of preservation and use as the guiding principles of national park administration.[69] Enacted as part of the same

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At the same time, however, decisions of the Secretary of Interior concerning the disposition of lands under his management have frequently been set aside as contrary to the purposes of the legislation from which his authority was allegedly derived. See *Lane v. Hoglund*, 244 U.S. 174 (1917); *Moore v. Robbins*, 96 U.S. 530 (1887); *Barash v. Seaton*, 256 F.2d 714 (D.C. Cir. 1958); *McKay v. Wahlenmaier*, 226 F.2d 35 (D.C. Cir. 1955).

[68]In this connection, we are not certain whether the Department can reconcile the inevitable use by commercial vehicles of the proposed Mineral King Highway with its own regulations, 36 C.F.R. §§ 5.6(b)-(c), which provide:

> "(b) The use of government roads within park areas by commercial vehicles, when such use is in no way connected with the operation of the park area, is prohibited, except that in emergencies the Superintendent may grant permission to use park roads.
>
> "(c) The Superintendent shall issue permits for commercial vehicles used on park area roads when such use is necessary for access to private lands situated within or adjacent to the park area, to which access is otherwise not available."

[69]In assuming that under some circumstances the Secretary may have a continuing mandate to create facilities for public use of the parks under the directive in 16 U.S.C. § 1 to provide for their "enjoyment," we may have assumed too much. See Darling and Eichhorn, *Man and Nature in the National Parks*, Conservation Foundation, p. 20 (2d ed. 1969):

legislation, 16 U.S.C. § 3 authorizes the Secretary to grant 30-year permits for certain uses of national park lands. Several years later, in 1924, the Congress enacted 16 U.S.C. § 8, 43 Stat. 90, authorizing the Secretary to "construct, reconstruct, and improve" roads within the parks. If, as we contend, the park purposes enumerated in 16 U.S.C. § 1 are exclusive, and the term permit and roadbuilding authority conferred by 16 U.S.C. §§ 3 and 8 is to be used only in furtherance and never in derogation of these purposes, then for the reasons we have already outlined the Secretary's approval of a park routing for the new Mineral King Highway is unlawful.

Before moving to our discussion of legislative history, three observations seem to us in order. First, we are dealing here with statutory provisions that, so far as concerns the limitations they impose on the Secretary's authority to construct roads on park lands, have never been the object of judicial scrutiny. Second, as best we can discover, the Department has, apart from the unacceptable *post hoc* rationalizations offered in these proceedings, never asserted the right to slice a highway corridor through a park to service an off-park location, or acted as though it possessed such authority. The doctrine whereby special deference is paid in resolving problems of statutory construction to an agency's understanding of its own authority, see *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (Mineral Leasing Act of 1920), and *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S.

"[I]n a time when the population is expected to increase considerably, along with leisure time and technical ability in moving over remote country, we are bound to ask whether the parks are to be considered as expendable assets, and what kind of enjoyment of national parks will be available for posterity. It is our belief that many people 'enjoy' the parks although they do not visit them. The very fact that such preserved areas exist is a matter of immense satisfaction to people who take the view that nature exists in her own right and that it is the duty of reflective man, with his dominance over the planet, to conserve the areas represented by national parks for the reasons they were chosen for that dignity."

309, 318 (1958), is for this reason wholly inapplicable. See *Investment Company Institute v. Camp, supra,* 39 U.S.L.W. at 4409 (refusing to apply the doctrine under similar circumstances on the ground that a *post hoc* rationalization of agency action during litigation is "hardly tantamount to an administrative interpretation"). Third, the Congress could fairly be charged with creating an odd statutory scheme indeed if it started out with a statement of "fundamental purpose" of national park administration, see 16 U.S.C. § 1, and then went on, without indicating it was doing so, to authorize the Secretary to issue permits and build roads within the parks for unrelated and conflicting purposes. A strong showing of legislative intent should be required before it is supposed that the Congress proceeded in a manner so awkward and so apt to generate confusion, and—at least thus far—the government has made no showing whatever of legislative intent.

During the early years of this century, public use of the 13 existing national parks started to mount sharply. H. Rep. 700, 64th Cong., 1st Sess., p. 5 (1916).[70] As the then Secretary of Interior Franklin Lane explained in a letter to the Chairman of the House Committee on Public Lands, adequate administrative machinery to handle the influx of visitors was not in place. The parks were being managed as independent entities, by officials burdened with other duties and lacking in expertise, under laws that the Secretary described as "not uniform."[71] *Id.* at 6. The legislative

[70] For example, the report indicates that in Sequoia National Park the number of visitors increased from 1,251 in 1908 to 7,647 in 1915. These figures compare with the 919,300 visits that the park received in 1969.

[71] Sequoia National Park itself was established by an Act of September 25, 1890, 26 Stat. 478, 16 U.S.C. §§ 41, 43. The Secretary was directed by this legislation to "provide for the preservation from injury of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition." 16 U.S.C. § 43. When the boundaries of Sequoia National Park were revised in 1926, 44 Stat. 818, 16 U.S.C. § 45a, the Secretary was directed to:

response, embodied in H.R. 15522, 64th Cong., 1st Sess. (1916), was a proposal to create a central administration for the parks—and also for the several existing national monuments, some of which were then under the jurisdiction of the Secretary of Agriculture and two of which were under the jurisdiction of the War Department—to be known as the National Park Service. The "fundamental purpose" of park administration was defined by Section 1 of the bill, without change between its introduction and its final enactment as P.L. 64-235, in the precise terms that still remain in 16 U.S.C. § 1. Nowhere does it appear that the "fundamental purpose" was not intended as the only purpose. Certainly that does not appear from Section 3 of the bill, now 16 U.S.C. § 3, which merely provides the Secretary with a grant of authority to publish necessary regulations, to take certain actions protective of park values,[72] and to issue term permits

"make and publish such reasonable rules and regulations, not inconsistent with the laws of the United States, as he may deem necessary or proper for the care, protection, management, and improvement of the same, such regulations being primarily aimed at the freest use of said park for recreation purposes by the public and for the preservation from injury or spoilation of all timber, natural curiosities, or wonders within said park and their retention in their natural condition as far as practicable, and for the preservation of said park in a state of nature so far as is consistent with the purposes of of sections 45a-45e of this title." 16 U.S.C. § 45b.

In our view, the legislative directives relating specifically to the administration of Sequoia National Park are restatements of the "fundamental purpose" of all the parks as defined by 16 U.S.C. § 1. We do not think they either expand or constrict the authority that the Secretary has with respect to the construction of roads generally, and 16 U.S.C. § 1—as well as 16 U.S.C. §§ 3 and 8—are fully applicable in the administration of any area in the national park system "to the extent such provisions are not in conflict" with other provisions specifically applicable to such area. 16 U.S.C.A. § 1c(b) (Supp. 1971).

[72]This section does authorize the Secretary to grant the privilege of grazing livestock within the parks where in his judgment such use would not be "detrimental to the primary purpose" of the parks. Even here, however, as the report of the Conference Committee on H.R. 15522 makes clear, grazing reduces the risk of fire and therefore affirmatively serves a park purpose. H. Rep. 1136, 64th Cong., 1st Sess., p. 2 (1916).

for "the use of land for the accommodation of visitors." Indeed we are surprised that the government should have made any attempt to bolster its case by reference to this provision, since unless a road is regarded as an "accommodation" for visitors—a strange usage that finds no support in the legislative history—the provision has nothing whatever to do with the construction of roads in parks.[73]

[73]In its Reply Brief in the Ninth Circuit (pp. 11-12), the government explained that the Department:

> "proposes to issue, under its discretionary management function in 16 U.S.C. Secs. 1 and 3, to the State of California a revocable special use permit for construction of a 9.2-mile road in this Park."

A copy of the special use permit that the Department proposed to issue was attached as an Appendix to the Reply Brief. It shows that the Department of Public Works, State of California, as permittee, was to be authorized to use the 9.2-mile strip of land in Sequoia National Park, containing 220 acres more or less, for the purpose of constructing and maintaining a "highway to Mineral King." The authorization was to cover the period from February 15, 1969 to February 14, 1989.

There are several things to be said about this proposed permit. First, it is not, as the government represents it to be, "revocable"—whatever that idea may mean in regard to permanent roads. Rather it is for a fixed term of 20 years. Second, it nowhere purports to be issued "for the use of land for the accommodation of visitors," which is the only use to which the permit procedure outlined in 16 U.S.C. § 3 applies. Third, the fact that it is to be issued for a 20-year term (rather than the allowable 30-year term prescribed for permits issued under 16 U.S.C. § 3) suggests that the Department was proceeding under 16 U.S.C. § 45b, which relates specifically to Sequoia National Park and which provides in part:

> "Said Secretary may, in his discretion, execute leases to parcels of ground not exceeding ten acres in extent at any one place to any one person or persons or company for not to exceed twenty years, when such ground is necessary for the erection of buildings for the accommodation of visitors."

Obviously if the Department is proceeding under this provision—as indeed may be required since it is specifically applicable to Sequoia National Park and therefore should displace provisions relating to the parks generally, see 16 U.S.C.A. § 1c(b) (Supp. 1971)—the permit is unauthorized. By its terms it covers more than ten acres and does not pertain to "the erection of buildings for the accommodation of visitors."

While 16 U.S.C. § 8 obviously does have to do with the construction of park roads, contrary to the view of the Ninth Circuit it does not supply the Secretary with authority to approve a cross-park highway to Mineral King. Legislation containing this provision was introduced, as H.R. 3682, 68th Cong., 1st Sess. (1924), and enacted, P.L. 68-70, 43 Stat. 90, at the urging of then Secretary of Interior Herbert Work. It was not more authority that the Secretary was after—that subject was never even mentioned—but rather more money to build a road network adequate for growing park needs. In a letter to the Chairman of the House Committee on Public Lands, he noted that both parks and automobiles were becoming more popular,[74] that most park roads had been designed for horse-drawn traffic, that only meager appropriations had been made for improvements, and that there were only 12 miles of hard surface in the entire system. H. Rep. 258, 68th Cong., 1st Sess., pp. 2-3 (1924). What he sought—and what Section 2 of H.R. 3682 provided—was a $7.5 million authorization spread over three years to carry out a program of new construction and reconstruction of roads within the parks. Section 1 of the bill, which survived as 16 U.S.C. § 8 but attracted no notice on the way to its enactment,[75] was simply a prefatory statement of the work to be accomplished with the authorized funds. We do not see how a revenue authorization to build roads that would allow the public easier motor access to the parks

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[74] Visitors in the parks and monuments, said the Secretary, had increased from 356,097 in 1916 to "the tremendous total of 1,493,712." An expanded system of parks and monuments received a total of 163,990,000 visits in 1969. *Public Use of the National Parks December 1969*, Department of Interior, National Park Service, Table 3A at p. 9 (1969).

[75] For example, in responding on the floor of the House to a request for an explanation of H.R. 3682, the Chairman of the Committee on Public Lands stated, 65 Cong. Rec. 4454:

> "[T]his bill merely provides for an authorization of an expenditure between now and June 30, 1927, at the rate of $2,500,000 for each fiscal year."

and motor circulation within the parks can now be brought forward as justification for a decision to use Sequoia National Park as a platform for a high-speed through route to Mineral King.

In sum, there is nothing at all in the legislative history of 16 U.S.C. §§ 3 and 8 to indicate that these provisions were intended to enlarge or modify the "fundamental purpose" for which 16 U.S.C. § 1 states that the parks are to be administered. And we have already seen that no such indication emerges from the judicial decisions on which the government relies. As one court put it: "Anything detrimental to this purpose is detrimental to the park." *New Mexico State Game Comm'n v. Udall,* 410 F.2d 1197, 1200 (10th Cir.), *cert. denied,* 396 U.S. 961 (1969). On the other hand, 16 U.S.C. § 20 manifests on the part of Congress both an awareness that heavy visitation by the public threatens to impair park values and a clear intention—one that the government has taken no cognizance of in these proceedings—that major alterations of park landscape should be undertaken only when "necessary" to provide for "public use and enjoyment of the national park area in which they are located." Whatever the full implications of this legislative policy may be, it surely rules out—or makes it evident that 16 U.S.C. § 1 itself rules out—road construction designed to promote the enjoyment of areas located beyond park boundaries.

F. Only Congress Can Authorize a Park Routing for the Mineral King Highway.

It may be that the Mineral King development complex would serve a public purpose of such overriding importance that an access highway, however destructive of park values, should be routed through Sequoia National Park. But that judgment is not the Secretary's to make. His statutory responsibility is to act in the interests of the parks, not to subordinate those interests to others according to his own

notions of public policy. Whether an area ought to be carved out of Sequoia National Park to serve a purpose unrelated to the preservation or enjoyment of the park itself is a judgment that only Congress can make.[76]

CONCLUSION

For the foregoing reasons, the order of the Court of Appeals vacating the preliminary injunction should be reversed.

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[76]We note that in 1958 Congress rejected a proposal to authorize the Secretary to exclude approximately 6,000 acres from Sequoia National Park in the vicinity of the Mineral King Road. This proposal appeared as Section 1 of H.R. 6198, 85th Cong., and was supported by the Department, but it was deleted by amendment in the House Committee on Interior and Insular Affairs. H. Rep. 1712, 85th Cong., 2d Sess., p. 2 (1958). At the same time the Committee approved, and the Congress enacted, P.L. 85-644, 72 Stat. 604, 16 U.S.C. § 45a-3, Section 2 of H.R. 6198, which authorized the Secretary to exclude 10 acres from Sequoia National Park, such land to be added to the game refuge area of Sequoia National Forest at the point where that area was intersected by the Mineral King Road. The purpose of this exclusion was to protect persons to whom cabin permits had been issued at a time, prior to an accurate boundary survey, when the 10 acres were thought to lie inside the national forest rather than the national park.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~939~~ 70-34

SIERRA CLUB,

Petitioner,

v.

ROGERS C. B. MORTON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE WILDERNESS SOCIETY, IZAAK WALTON LEAGUE OF AMERICA, AND FRIENDS OF THE EARTH AS AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 939

SIERRA CLUB,

Petitioner,

v.

ROGERS C. B. MORTON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE WILDERNESS SOCIETY, IZAAK WALTON LEAGUE OF AMERICA, AND FRIENDS OF THE EARTH AS AMICI CURIAE

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (R. 208-235) is reported at 433 F.2d at 24. The opinion of the United States District Court for the Northern District of California (R. 186-199) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1970. The petition for a writ of certiorari was granted on February 22, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Sierra Club has standing to sue to prevent damage to Sequoia National Game Refuge, Sequoia National Forest, and Sequoia National Park under statutes designed to protect these areas as:

a. A national conservation organization whose purpose is to protect the environment;

b. A local conservation organization with a long history of interest in protecting the Sierra Nevada Mountains and particularly these specific areas;

c. Representative of its members who have standing to protect public lands held in trust for them; or

d. A user itself of these areas and representative of its members who are users.

2. Whether the court of appeals erred in reversing the district court's grant of a preliminary injunction by requiring plaintiff to show a reasonable certainty that it would prevail and finding no irreparable injury despite the threatened start of construction of a large resort, highway, and electrical transmission line.

3. Whether defendants are violating Federal statutes by allowing the construction of a large resort and connecting highway and electrical transmission line in Sequoia National Game Refuge, Sequoia National Forest, and Sequoia National Park. More specifically whether defendants may—

a. Issue a permit to build a large resort on 13,000 of the 15,000 acres of land in Sequoia National Game Refuge even though Congress has provided that all uses of the refuge must be consistent with its purpose to protect wildlife.

b. Issue a permit for 13,000 acres of land in a national forest for a resort even though Congress has imposed an 80-acre limit on term permits for resorts and the permit is not genuinely revocable either in law or in fact.

c. Authorize a major highway to be constructed across Sequoia National Park which will harm the park and will be used to allow visitors to come to a commercial resort outside the park.

d. Authorize an electrical transmission line across Sequoia National Park even though Congress has specifically required Congressional approval before any transmission line can be built in the park.

INTEREST OF AMICI CURIAE

All three amici curiae are major, national conservation organizations with deep and well-established interests in protecting America's great scenic resources. They are increasingly relying upon litigation as a principal means of carrying out their purposes.

The Wilderness Society is a nonprofit citizens' organization with approximately 70,000 members. It was organized in 1935 to obtain protection for the Nation's remaining wildlands, to carry on education programs concerning the wilderness, and to conserve our national resources.

Friends of the Earth is a nonprofit organization with 22,000 members and is dedicated to the preservation, restoration and rational use of the environment in the United States and throughout the world. It is particularly interested in preserving the world's natural ecosystems and remaining wild places.

The Izaak Walton League of America is a nonprofit organization with approximately 55,000 members. Its primary goal is restoring and maintaining the quality of the environment through the protection and wise use of our natural resources.

Both the petitioner and respondents have consented to the filing of this brief.

STATEMENT OF FACTS

The Forest Service of the Department of Agriculture began to make plans for the development of Mineral King in the 1940's (R. 43, 44, 47). In February 1965 the Forest Service issued a prospectus for recreational development of Mineral King (R. 26).

In December 1965, the proposal submitted by Walt Disney Productions, Inc., was selected by the Forest Service from the six bids received (R. 27). On January 10, 1966 (R. 27), the Forest Service granted Disney a three-year planning permit (R. 166, 176).

The Secretary of the Interior "with great reluctance" (R. 139; see R. 65, 136), on November 11, 1968, authorized the State to build a highway across Sequoia National Park to the resort to be constructed in Mineral King (R. 37, 136, 137). The actual permit has not been issued pending development and approval of a specific highway design (R. 182).

On January 21, 1969, the Forest Service approved the plan of Walt Disney Enterprises and stated that a thirty-year term permit for 80 acres and a revocable permit for additional land would be issued as soon as the State of California executed the first contract for construction of a significant portion of the new highway to Mineral King (R. 27-28, 166). In February 1969, a publication of the Forest Service entitled "Mineral King—A Planned Recreational Development" stated that "under an annual permit [Disney] will be permitted to construct lifts and trails throughout about 13,000 acres" (R. 31).

When the Sierra Club learned that the Secretaries of Agriculture and Interior were seriously considering a large development (R. 26, 41, 46), Dr. William E. Simm requested on June 7, 1965, on behalf of the Sierra Club Board of Directors, a hearing upon the proposed development (R. 26, 47). This

request was denied (R. 48). On August 7, 1965, a Sierra Club staff member, J. Michael McCloskey, reiterated the request for a hearing because of the special national characteristics of Mineral King and the size of the proposed development, the fact that Mineral King should be treated as primarily a game refuge, the opposition to the proposed development and the lack of any hearing since 1953, and the important questions of public policy involved (R. 41-44). This request and a subsequent request by telegram on November 3, 1965 (R. 46), were both denied (R. 26).

In view of the imminent start of construction of the resort and highway (R. 8, 184, 79), the Sierra Club brought suit in the United States District Court for the Northern District of California on June 5, 1969, seeking to enjoin defendants Hardin, Deinema, and James from taking any action toward implementation of the Disney development (R. 10) and defendants Hickel and McLaughlin from authorizing or approving design standards, rights of way, or construction of the proposed highway (R. 11).

The district court, upon the basis of affidavits from plaintiffs and defendants and after hearing two days of argument (R. 200), decided that there were substantial questions as to whether defendants had exceeded their statutory authority and that irreparable injury would result if an injunction were not issued (R. 199-200). The court therefore issued a preliminary injunction prohibiting defendants from granting any permits, rights-of-way or approvals of the Disney development or the highway across Sequoia National Park providing, however, that investigations, planning, surveys and explorations which did not interfere with the terrain could continue (R. 200-201).

The court of appeals reversed, holding that the Sierra Club did not have standing to sue (R. 213-224) and that the defendants had not exceeded their statutory authority (R. 224-234). The court vacated the preliminary injunction (R. 234) but stayed issuance of its mandate pending disposition of the petition for a writ of certiorari.

The Mineral King Area

The Sequoia National Game Refuge was created in 1926 encompassing the Mineral King Valley (R. 42). The refuge is a 15,000 acre portion of the Sequoia National Forest bounded upon three sides by Sequoia National Park (R. 26). Mineral King is described in the record as (R. 53a, 41-42):

> Unsurpassed in natural splendor, Mineral King is perhaps more similar to the European Alps than any other area in the United States. Altitudes range from the 7,900 foot valley to surrounding mountains that reach the 12,400 foot level. The High Sierra wonderland, located in Sequoia National Forest, is generously endowed with lakes, streams, cascades, caverns and matchless mountain vistas.
>
> * * * * *
>
> Although their scenic and ecological features are reminiscent of many other Sierra regions, Mineral King and environs are unique. They are unlike any other roadhead that we have ever visited. Where else in the Sierra does a primitive roadhead reach to the headwaters of a major river (east Fork of the Kaweah)? Where else does a road provide such direct access to so many alpine passes (five or more)? Yet the two mile long valley is essentially unspoiled. Mineral King's U-shaped basin is rimmed with 12,000 footpeaks rising 3,000 to 4,000 feet above the valley from whose flank streams, cascades, and torrents tumble into the narrow floor, which is mainly a flood plain and wash for the river. A number of lakes are within less than a two-hour walking distance of the valley, which is a trail center where at least seven routes radiating in all directions open up the southern part of Sequoia-Kings Canyon National Park, Sequoia National Forest, the magnificent Big Kern Sierra to the west, and the Little Kern territory below Forewell Gap. The massive self-contained ecological unit of Mineral King itself (protected in a National Game Refuge) and the surrounding country are one of the finest wilderness-type areas we have ever seen.

The Walt Disney Ski and Summer Resort

The solicitation to bid for the development of Mineral King called for bids for a facility including four ski lifts, parking for 1,200 automobiles, overnight accommodations for 100 skiers, and an estimated investment of 3 million dollars (R. 27). In contrast, Walt Disney Enterprises plans to build a year-round recreational facility. It will cover 13,000 (R. 31, 229-230) of the 15,000 acres (R. 26, 81) in the national game refuge. When fully developed, 1.7 million visitors are expected annually (R. 53a) and as many as 14,000 daily, which is nearly twice the concentration of visitors as in the Yosemite Valley (R. 28).

Walt Disney Enterprises plans initially to invest 35 million dollars to construct an alpine village with shops, theater, convention center, hospital, accommodations for 3,310 visitors, twenty-two lifts and gondolas, ten restaurants, an avalanche dam and stream control facilities, riding facilities with at least fifty horses, a five-story parking facility for 3,600 vehicles, and refuse and sewage facilities (R. 27, 31, 53a-53b, 126, 130-131, 134). The ski lifts, ski trails, parking facility, refuse and sewage disposal facilities and service roads will be on the land subject to the annual permits (R. 15, 23, 31, 191-192, 229-230).

The development will require "extensive bulldozing and blasting in most lower areas and extensive rock removal at high elevations" and the "grooming and manicuring" of most slopes (R. 32). There will be "a need for land modification, earth moving, and possibly stream channel changing beyond what we [the Forest Service] might normally permit" and "a great deal of earth and debris moving" (R. 128).

These are only present plans since a brochure of Walt Disney Productions says (R. 53a, 28):

> All of us promise that our efforts now and in the future will be dedicated to making Mineral King grow to meet the ever-increasing public need. I guess you might say that it won't ever be finished.

Numerous government officials have stated their strong concern about the effect of the development. Mr. J.C. Fraser, Chief Water Projects Branch, California Department of Fish and Game, has said in a letter (R. 30, 76):

> Your fourth question regards the potential effect of development in the Mineral King Game Refuge on game. This Department has not made specific studies nor prepared reports regarding the effects of this development on wildlife. We can say, however, that in an extensive development such as the Disney proposal, considerable wildlife habit would be lost and wildlife would suffer from human encroachment.

The Director of Wildlife Management of the Forest Service, W.O. Hansen, has expressed concern about the effects of the planned riding concession—"It appears that this could cause serious problems in sanitation and esthetics"; sewage disposal, "I would question whether the soil can adequately handle the effluent"; and check dams to collect debris, "What is the source of the debris? Will it result from timber cutting on the ski runs" (R. 126). He has said that "I would hope that we study the impacts of this concession for a long time before permitting another one" (R. 126).

Mr. R.M. DeNio, Director of Range Management of the Forest Service, has written: "To what degree has the compatibility of planned horse programs with resource needs been determined? The projected use by people, in itself, will have a very real impact on these fragile soils and vegetation without the additional effect of horse use" (R. 127). Mr. DeNio concluded, "There is a real need for basic consideration of soils and vegetation" (R. 127).

The Chief of the Forest Service Division of Recreation, Mr. W.S. Davis, has written to the Sequoia National Forest Supervisor (R. 34, 192):

> The impact is certain to be heaviest at the village site and on the valley floor. By accepting the development proposal we have also accepted that

> some effect on fishery values, streamflow, vegetation, soils, and other resources must be provided for.

The Range and Wildlife Management Section of the Forest Service stated in a memorandum to the Recreational Section of the Forest Service (R. 130):

> We have reviewed subject report [on Preliminary Site Studies Proposed Development of Mineral King] . . . .
>
> We feel the report is rather superficial, and the investigations it covers apparently very general and sketchy. Consequently we find many of the assumptions made and conclusions reached are inadequately founded and unacceptable.

After citing problems with streamflow release, channel diversions, and the "Valley Debris Dam" (R. 130), the Range and Wildlife Section concluded (R. 131):

> The total basic concept of development appears badly biased in orientation toward a highly artificial, continued situation, without any real attention to ecological factors and needs to multiple use management. The extent and nature of alterations of the basin is unacceptable to us—the damages extend beyond effects on fish and wildlife, and these alone are critical.
>
> Specifically, stream diversion and channel treatment, flood and debris control, surface water supply development, and sewage disposal proposals are all of a nature we find severely damaging or unacceptable.
>
> It is recognized that development of high intensity year-round recreational use in this restricted fragile sub-alpine area is bound to result in pronounced impacts and certain unavoidable changes.

The Highway Across Sequoia National Park

Mineral King is now reached by a road running from Three Rivers, California, and across part of Sequoia National Park (R. 60, 63). It is a low standard road constructed to support the mining activities of the 1870's (R. 28). The road is approximately 25 miles long and according to the

California Division of Highways, "consisting of extremely substandard alignment and grades. There are a number of switchbacks with radii of less than 50 feet" (R. 60). A study done for the Park Service by the Clarkeson Engineering Company says that "it is a widened trail which winds up the mountain, has grades in excess of 15% [and] is narrower than two lanes in many areas" (R. 144). "Most of the surface is oiled dirt with several sections consisting of only a graded roadbed" and it now has an average of only 95 cars daily (R. 60).

The California Division of Highways estimates that by 1978 the traffic to the Disney resort will have an average daily volume of 4,550 vehicles, with the average daily volume during the peak summer months being 9,850 vehicles (R. 60). The present road is not adequate to accommodate the anticipated traffic load (R. 79, 144). Consequently, the permits to construct the resort at Mineral King were contingent upon the construction of an all-weather high-speed highway from State Highway 198 to Mineral King (R. 161, 167, 187). The highway is designed to serve Mineral King rather than Sequoia National Park (R. 54, 58, 140, 143, 194) since there are no plans to develop the area of the park through which the highway passes (R. 36).

The State of California has authorized the construction of the new highway with state highway funds (R. 140, 161). The central portion of the road will cross a six-mile width section of Sequoia National Park but, due to the terrain of the area, 9.2 miles of road will be needed (R. 54, 62-63, 65, 161). The highway will require "extensive cutting and filling accompanied by extreme back slopes and embankment slopes to accomplish a steady earthwork condition" (R. 150). The roadbed itself will be 28 feet across but in some areas the embankment slopes will extend 800 to 1,000 feet across (R. 148).

The California Division of Highways has stated that the new road will be almost entirely different from the old (R. 61):

> Several corridors were initially considered but based on reconnaissance studies, it was concluded that feasible development of an all-weather highway to Mineral King is possible only in the corridor of the east fork of the Kaweah River. The existing country road to Mineral King generally parallels this water course; however, very little of the existing roadbed can be incorporated into the proposed all-weather highway.

Although the Park Service's consultant, the Clarkeson Engineering Company, proposed a route that would incorporate "approximately two-thirds of the old road" (R. 145), the Park Service chose the Division of Highway's route instead of Clarkeson's (R. 138).

The highway is planned as two lanes with extra safety lanes for passing at frequent intervals (R. 54, 61). The passing lanes are the subject of a dispute between the Park Service, on the one hand, and the Forest Service and California Division of Highways, on the other. The latter two agencies favor passing lanes so that vehicles would have to wait no more than five minutes in a queue without an opportunity to pass and that peak capacity would be 1,200 cars per hour in one direction (R. 39, 61, 79). The Park Service objects to the passing lanes in Sequoia National Park and questions whether 850 cars per hour in one direction can be adequately accommodated on the proposed highway even with the passing lanes (R. 136-138, 155-157).

The Park Service fears it will be pressured to permit expansion of the road to four lanes (R. 136-137). Secretary of the Interior Udall wrote Secretary of Agriculture Freeman in 1968 that (R. 136):

> In addition to our desire to minimize the damage to park values of the road, we are concerned about what we have been told concerning the size of the planned Disney development. Will one two-lane road of park standards be adequate or will Interior later receive a request for another road?

John Clarkeson, a consultant to the Park Service, has stated that "[u]nless some control or other is considered, this two-lane road does not look at all adequate for a 14,000 a-day-visitor load when so many will be one-day visitors" (R. 157).

Clarkeson also concluded (R. 142-143):

> [T]he road, if primarily based on cut and fill construction [instead of following the terrain as the existing road does] would be a barrier to wildlife and visitor movements throughout this area of the park. Animals and men would have to cross the road to the risk not only of such persons and wildlife, but also to users of the highway.
>
> Among the wildlife species of this area are deer, wolf, mountain lions, beaver, bear and big horn sheep. The retention and control of these species would be affected if relatively free movement up and down their slopes was not maintained.

The Park Service has also expressed fears about the impact of the road upon the floor of the park, especially upon the sequoia trees (R. 62, 67). The California Division of Highways therefore hired Dr. Richard Hartesveldt to assess the impact of the proposed road (R. 62, 67). He found that 45 sequoias "are in a position of possible jeopardy because of road construction" (R. 85, 123).

The Secretary of Interior originally was extremely reluctant to approve the highway across Sequoia National Park and urged that an alternative be explored (R. 65, 136, 139). The California Division of Highways studied two alternatives, but found them too expensive (R. 66). Secretary Udall later acquiesced and gave permission for the highway based on the assurance that protection of the park would be given adequate consideration (R. 62-63, 137-139).

The Electrical Transmission Line Across Sequoia National Park.

A 66,000 volt power line across Sequoia National Park to Mineral King is planned in order to serve the power needs of the resort (R. 40). The line will generally follow the pro-

posed road alignment (R. 40) and will therefore cross about 9.2 miles of park land (R. 65).

SUMMARY OF ARGUMENT

I

Plaintiff, the Sierra Club, has standing if "the challenged action has caused [it] injury in fact, economic or otherwise" and if "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute" *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152, 153 (1970).

A. There can be no doubt that the Sierra Club satisfies the second requirement. The statutes upon which plaintiff relies were designed to protect Sequoia National Game Refuge, Forest, or Park. For example, 16 U.S.C. 688 allows the Secretary of Agriculture to permit use of lands in the game refuge only "so far as they may be consistent with the purposes" of the refuge "to protect from trespass the public lands of the United States and the game animals which may be thereon." Since plaintiff is a conservation organization attempting to protect the wildlife, scenery, trees, and other aspects of the refuge, forest and park, its interests are within the zone of interests protected by the statutes.

B. The injury required for standing requires "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). The plaintiff's interest "may reflect 'aesthetic, conservational, and recreational' as well as economic values." *Association of Data Processing Service Organization, Inc. v. Camp, supra*, 397 U.S. at 154. The Sierra Club has suffered injury of the kind which gives

it a personal stake in this controversy and which assures concrete adverseness.

1. First, the Sierra Club has standing as a national conservation organization interested in protecting the environment. The Sierra Club has a long history of attempts to protect the environment. It is today one of the largest conservation organizations in the country and is currently involved in 38 major suits all over the country. Ever since 1965 when it first sought a public hearing, it has been opposing the development of Mineral King. Since the plaintiff obviously has the concrete adverseness needed to sharpen the issues far more even than an ordinary individual plaintiff, the constitutional requirements of a "case" or "controversy" are fully met.

Recognition of the standing of a national conservation organization is also consistent with the non-constitutional policy considerations which the courts have recognized in considering standing. There is no indication that the handful of cases which can be brought by national conservation organizations will overburden the courts. Since these organizations often have a broader outlook, they may be more careful in bringing actions and may thereby often lighten the burden of the courts by not bringing less well prepared or meritorious actions.

The courts have often considered whether there was anyone else with a better claim to standing than the plaintiff. While, in this case, local users of the area could bring suit, in many conservation cases this situation does not exist. There is frequently no present use (such as a suit to preserve the wilderness) or no use is possible (such as a suit to protect eagles). Even where there are users, they may be unwilling to sue such as nearby residents who desire the development of an area because of the economic benefit which will result. Yet, the national game refuges, forests, and parks must be preserved even if local residents desire to develop them. National conservation organizations should have standing to sue to protect these areas which Congress reserved for the benefit of the entire country.

The standing of national conservation organizations is further supported by federal statutes and judicial decisions. The Administrative Procedure Act has been repeatedly construed by this Court and lower federal courts to expand both the concepts of standing and reviewability. The National Environmental Policy Act declares, as the policy of this country, the protection of the environment. The President's Council on Environmental Quality which is charged with enforcing the Act, has concluded:

> Where an organization or group of citizens devoted to or with a demonstrated interest in environmental protection asserts a claim against an agency of the Government in reliance on the provisions of the National Environmental Policy Act, or of other legislation designed to protect the environment, the interposition of the Government of the defense if lack of standing is inconsistent with the federal environmental policy, as exemplified in the National Environmental Policy Act and in other legislation.

And the Ninth Circuit position is inconsistent with that of every other circuit and district court which has considered the issue.

2. Second, the Sierra Club has standing as a local conservation organization particularly interested in protecting Sequoia National Game Refuge, Forest, and Park. Numerous decisions, including that of the court below, recognize the standing of local conservation organizations. While the court of appeals did not find the Sierra Club to be such an organization, it is clear that the Sierra Club is both a national organization and a local organization with particular interest in the Sierra Nevada Mountains. Its headquarters is in San Francisco and 27,000 of its 78,000 members live in that area. John Muir and the Sierra Club were in large measure responsible for the creation of Sequoia National Park, its enlargement, and establishment of the game refuge. The Sierra Club's opposition over the last six years to development of Mineral King is a continuation of this activity.

3. Third, the Sierra Club has standing to represent the interests of its members in protecting lands in national game refuges, forests, and parks. The federal courts have held that such lands are held in trust for all the American people. *E.g., Utah Power and Light Co. v. United States,* 243 U.S. 389, 409 (1917). When a trustee does not defend the trust property, the beneficiary is entitled to bring suit to protect his interests. *Restatement of Trusts,* Sec. 282. All American citizens therefore have the right to sue to prevent despoilment of lands held in trust for them.

This Court has held that organizations can bring suit "as proper representatives of the interests of their members." *National Motor Freight Traffic Ass'n v. United States,* 372 U.S. 246, 247 (1963). The district court found that the Sierra Club was "regularly serving as a responsible representative" of persons interested in conservation. It therefore had standing to represent the interest of its members in protecting their rights in the invaluable land held in trust for them.

4. Fourth, numerous courts, including the court below, recognize the standing of users of an area for one to protect it. The Sierra Club itself is a user of the refuge and park since it runs a camping trip into the area yearly. Many of its members are also users and, as we have seen, the Sierra Club has standing to represent their interests.

II

The court of appeals erred in reversing the grant of a preliminary injunction by the district court. The district court has broad discretion to issue a preliminary injunction and an appeliate court will not normally reverse without a clear showing of an abuse of discretion. Here, the district court properly exercised its discretion.

A. The court of appeals held that a preliminary injunction can issue only upon a strong likelihood or reasonable certainty that the plaintiff will prevail on the merits. The

overwhelming majority of decisions of both this Court and the courts of appeals require only that plaintiff raise a serious or substantial question. While a minority of decisions require a strong likelihood or reasonable certainly that the plaintiff will prevail, most of these cases involve situations where no irreparable injury was threatened. Here, therefore, the district court properly issued the injunction because substantial and serious questions were raised.

B. The court of appeals plainly erred in finding that no irreparable injury was threatened. This is the classic case where an injunction is required to maintain the status quo pending determination of the merits. If the injunction had not been issued, construction of the highway and resort would have begun with serious harm to the national game refuge, forest, and park. On the other hand, the only harm to defendants and the interests they represent from the preliminary injunction is the delay from not being able to start construction immediately. The district court properly found that the balance of harm favored the issuance of the preliminary injunction.

III

If this Court holds that the district court's issuance of the preliminary injunction was proper, it is clear that the court of appeals' determination on the merits is not binding on remand. Nevertheless, since the court of appeals in effect decided the merits, it is likely that its views will prevail on remand either by influencing the district court or by forming the basis of a new decision on appeal. In view of the fact that this Court has granted certiorari on the merits and the legal issues have already been considered by the courts below, we urge this Court to consider the legal issues in order to give appropriate guidance to the district court on remand.

Article IV, Section 3, clause 2 of the Constitution gives Congress exclusive authority over the disposition of federal

land. The executive agencies have no power to dispose of land except insofar as they receive authority from Congress. Defendants must therefore demonstrate clearly their authority in permitting construction of the resort, highway, and transmission line.

A. The Secretary of Agriculture has no authority to issue either a term permit or revocable permit which will convert Sequoia National Game Refuge into a ski and summer resort. Congress has provided in 16 U.S.C. 688 that all uses of the refuge shall be consistent with its purpose "to protect from trespass the public lands of the United States and game animals which may be thereon . . . ." The refuge was created for the purpose of protecting the deer and other animals which make Mineral King and surrounding areas their home. The Forest Service promised, in supporting creation of the refuge, that even "grazing ought to be excluded from the game refuge area . . . ." Testimony of Chief Forester Greeley, Hearings on H.R. 9387 before the House Committee on Agriculture, April 7, 8 and 10, 1926, 69th Cong., 1st Sess. 57-58.

The permit to allow construction of the resort in Mineral King violates the language and purpose of Section 688. It would mean that 13,000 of the 15,000 acres in the refuge would be used for the resort. As many as 14,000 visitors and 4,550 automobiles a day would come to the area. There would be accommodations for 3,310 visitors, 22 ski lifts, 10 restaurants, and numerous other facilities. And there will be bulldozing, blasting, and manicuring of slopes throughout the area.

B. The Secretary of Agriculture has no authority to permit construction of a resort on 13,000 acres of a national forest.

1. The granting of a so-called revocable permit for 13,000 acres is an attempt to circumvent 16 U.S.C. 497 which allows the Secretary to grant 30-year term permits for 80 acres for resorts. Congress increased the acreage limitation from 5 to 80 acres in 1956 specifically because major resort

activities, including ski lifts, could not be encompassed within 5 acres. The Secretary cannot now ignore the acreage limitation simply by calling the permit for major, permanent facilities revocable.

2. 16 U.S.C. 551, upon which the court of appeals relied in upholding the Secretary, allows him only to make rules and regulations to protect the forests. This Court has held that it gives authority only over matters of "administrative detail." *United States v. Grimaud*, 220 U.S. 506, 516 (1911). Congress, judicial decisions, and opinions of the Attorney General (with only one exception) have made clear that a special statute was needed to permit construction of railroads and electrical and telegraph lines across national forest lands and that Section 551 did not give this authority. It therefore follows *a fortiori* that the Secretary has no authority to permit construction of a major resort.

Defendants rely on administrative practice and a single sentence from a recent Congressional committee report. However, administrative practice cannot be relied upon here because it was not contemporaneous with passage of Section 551, has not been consistent, and has not even been embodied in any regulation or written policy. While Congress has been informed that the Forest Service issues revocable permits, it has been told, as the Forest Service Manual states, that this is only for temporary uses.

3. The Secretary also has no inherent authority to issue the permit in this case. While numerous opinions of the Attorney General establish that federal officials can give revocable licenses for the construction of railroads, sewers and similar facilities across federal lands, the permit here is not revocable. It cannot be revoked in the full discretion of the Secretary since the permit for the 13,000 acres contemplates that it will last as long as the 30-year term permit for 80 acres; since administrative and probably judicial review would be available to the developer if revocation were attempted; since major structures are to be built which in fact are intended to remain; and since the land cannot be

restored, even if the structures were removed, to its previous condition.

C. The Secretary of Interior has no authority to allow a major highway to be constructed across Sequoia National Park.

1. Congress has made clear that the purpose of the national parks in general and Sequoia National Park in particular is to provide enjoyment by the public of the parks and to protect the trees, beauty and other natural characteristics. 16 U.S.C. 1, 20, 43, 45b, 61. When Congress enlarged the park in 1926, the sponsor of the bill stated that it would be retained as a trail park and that roads would not be built through it. 67 Cong. Rec. 19143.

The proposed road is an entirely new, high-speed highway. It will carry an average of 4,550 automobiles a day, will be often three lanes wide, and will have embankments up to 800 to 1000 feet across. It threatens the free movement of wildlife and at least 45 giant sequoias. It is therefore inconsistent with the intent of Congress in enlarging and protecting the park.

2. Congress has also made clear that the park land is to be used for the enjoyment by the public of the park itself. 16 U.S.C. 1, 466. All park facilities and service must serve visitors to the park. 16 U.S.C. 20, 3. Congress has stated, in creating another national park, that the Secretary of Interior does not have the function of building highways through the park to serve non-park purposes and the Department of Interior has itself issued Park Road Standards stating that park roads should not be built for such purposes. The proposed highway cannot be authorized because it is designed to connect a state highway with the commercial resort in Mineral King and not to serve the park.

D. 1. 16 U.S.C. 45c specifically prohibits the Secretary of Interior from allowing an electrical transmission line to be constructed across Sequoia National Park without the approval of Congress. While the principal purpose of the

provision was to cover hydroelectric projects, the statute explicitly went further. This Court has often held that federal statutes are to be construed according to the plain meaning of their language.

2. The electrical line may also not be constructed because it serves only a non-park purpose. Since it is intended to serve a commercial resort, it may not be built across Sequoia National Park for the same reasons a highway cannot be built for a non-park purpose.

ARGUMENT

Introduction

1. *Description of the Area*

The area which is subject to this suit is commonly called Mineral King. It is part of both the Sequoia National Game Refuge and of Sequoia National Forest. Mineral King is not only virtually surrounded, as the map on the next page shows, by Sequoia National Park but is integrally related to the park in terms of topography and nature.

Mineral King is much more than just a "unique combination of eight alpine bowls" as it is described in the Forest Service Fact Sheet which attempts to justify turning it into a ski resort.[1] It "is a two-mile-long valley rimmed by cliffs and cirques from which streams and freshets explode and cascade and tumble. It is a spot that has known the mark of man for nearly a hundred years and yet it is still unspoiled. The wild rugged beauty still exists as it must have been when the first prospectors poked into the deep ranges in the

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[1] *Mineral King—A Planned Recreation Development,* Forest Service, U.S. Department of Agriculture, February, 1969, p. 1.

1870's."[2] As John White, retired superintendent of Sequoia National Park described the Sequoia Park and Forest area:[3]

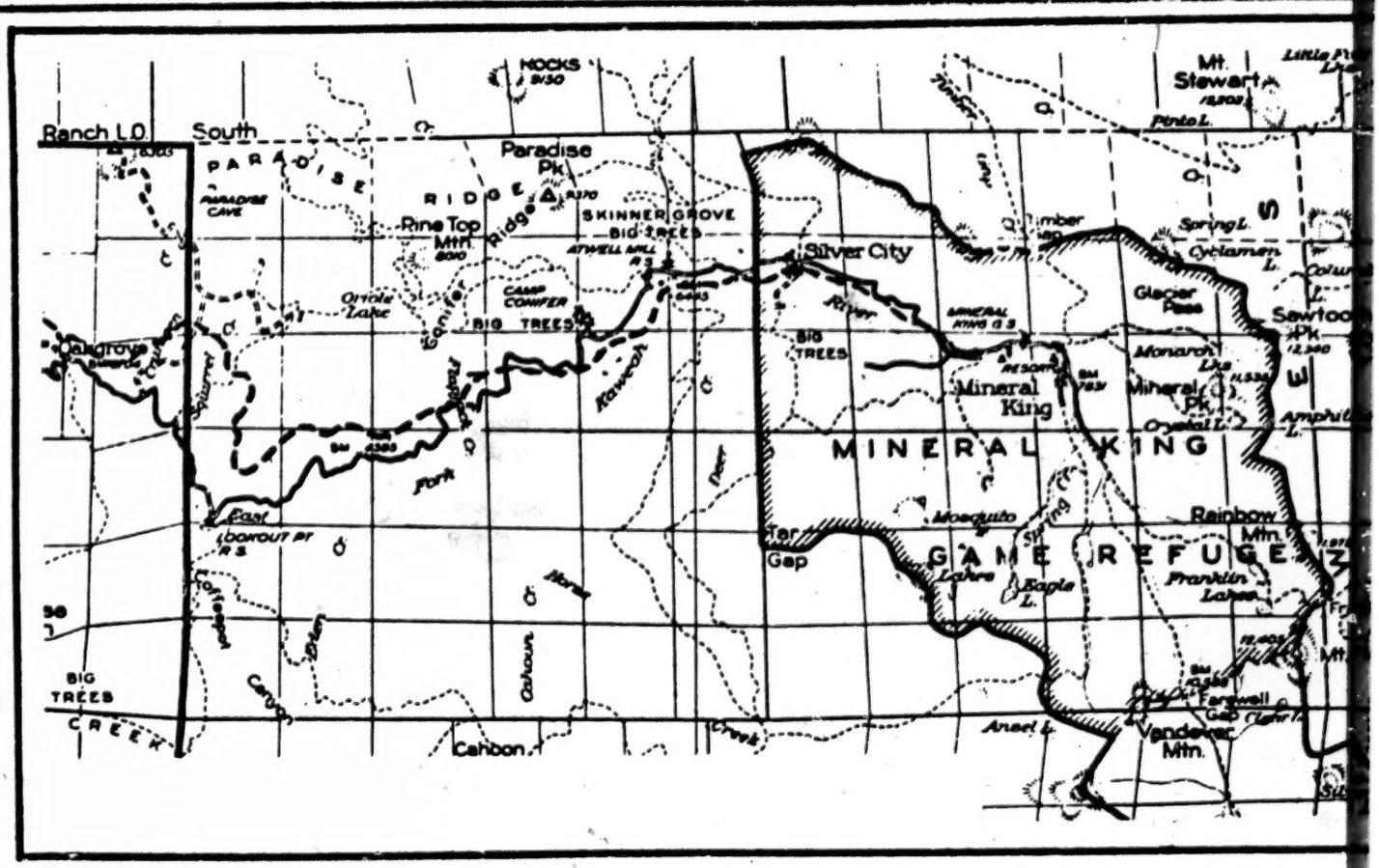
> Down the canyons rush the rivers, in full spate from May to July or August, in quieter mood at other seasons, fed by innumerable creeks that issue from mountain meadows and lakes. Above the rivers rise the cliffs and domes, John Muir's 'granite headlands,' jutting out toward the San Joaquin Valley to the West. From these cliffs tumble water falls and cascades, their spray misting the hanging gardens of flowers which paint the slopes from early summer until late autumn. The Pride of the Mountains, the scarlet pentstemon, persists through the earliest frosts to make sanguineous patches through the first snows of winter. In the upper canyons are lakes, azure and emerald gems, framed in a glacier-polished setting.
>
> The High Sierra Cordon of impenetrable peaks holds fast those hidden treasures that are the hikers' and packers' rewards—meadows green with short-hair grass or with sedges and flowers on the banks of meandering brooks; little hidden yosemites where the only sound from a mechanized world is the occasional drone of an airplane thousands of feet overhead but little more disturbing than the flight of hawk or eagle; innumerable fishing streams and lakes with camping sites beloved by the Sierra Club or by individual outfits; a paradisiacal land.

The game refuge is the home of the Mountain Bluebird, the Yellow Hawk, the Western Robin, the Golden Eagle and other birds and of such animals as the American Black Bear, Mule Deer, Mountain Lion, Sierra Beaver, California Grey Fox and California Wildcat.

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[2] Leadabrook, Russ, *A Guidebook to the Southern Sierra Navada Including Sequoia National Forest,* Los Angeles, California, 1968, p. 19.

[3] White, John and Pusateri, Samuel, *Sequoia and Kings Canyon National Parks,* Palo Alto, California, 1949, p. 35.



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LEGEND

Sequoia National Park

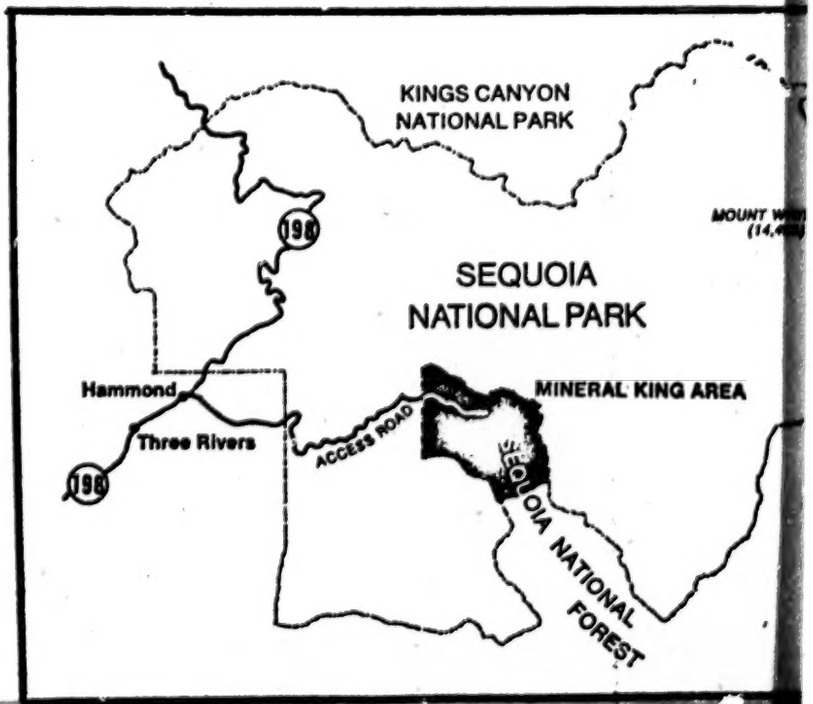
Mineral King

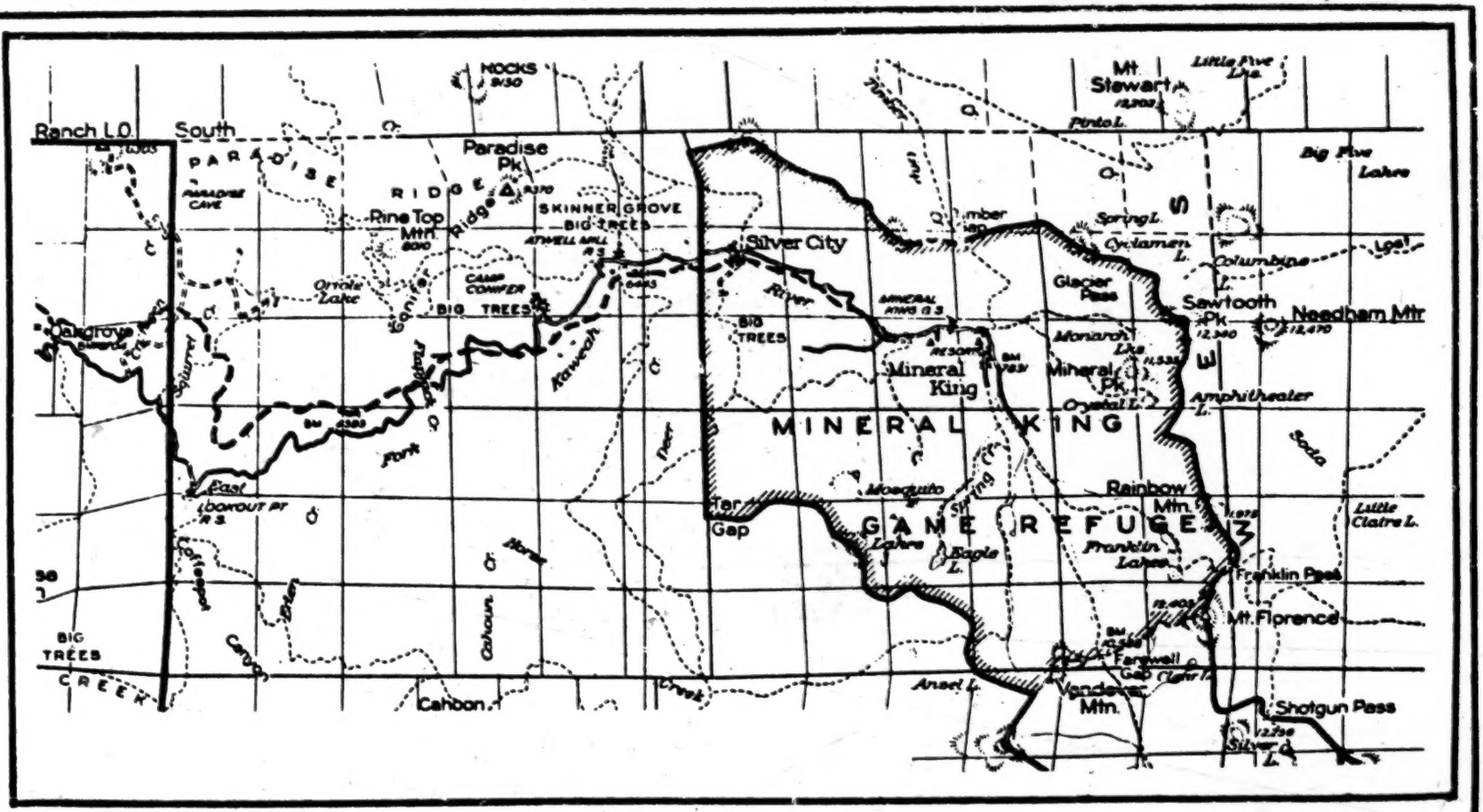
Roads:

proposed

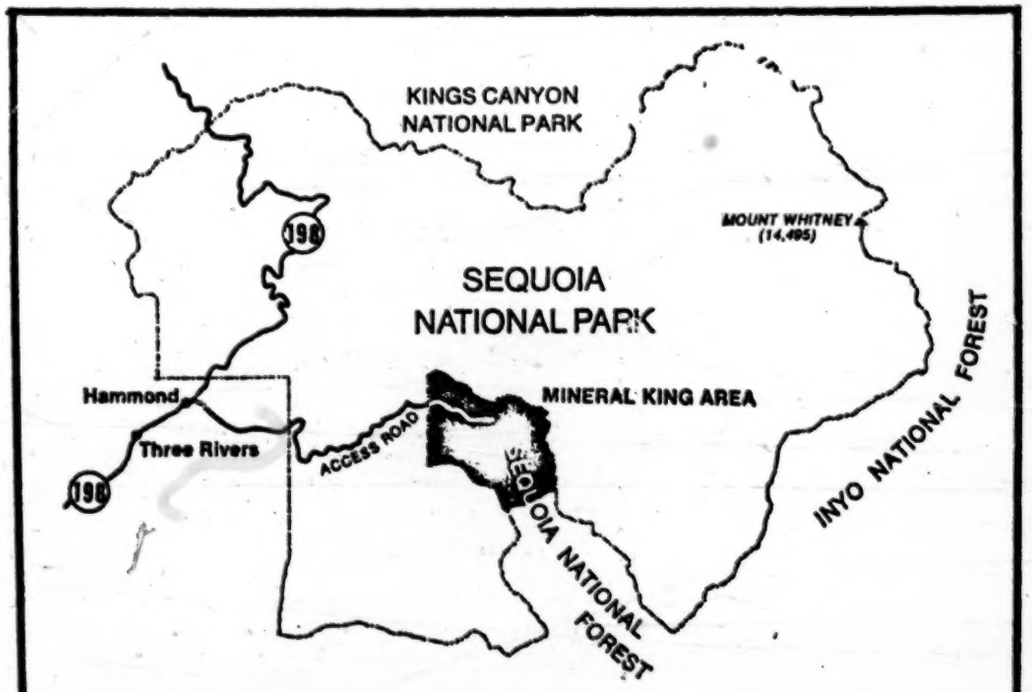
existing






Ranch L.O.
South
Paradise Pk.
PARADISE RIDGE
Pine Top Mtn.
SKINNER GROVE
BIG TREES
Silver City
Mineral King
MINERAL KING
GAME REFUGE 3
Rainbow Mtn.
Sawtooth Pk.
Needham Mtn.
Mt. Florence
Franklin Pass
Shotgun Pass
Vandever Mtn.
Mt. Stewart
Big Five Lakes
Amphitheater L.
Little Claire L.
Oakgrove
Cahoon
BIG TREES CREEK


San Francisco
SIERRA NEVADA RANGE
CALIFORNIA
SEQUOIA NATIONAL PARK
AREA OF DETAIL MAP
MINERAL KING
Los Angeles


KINGS CANYON NATIONAL PARK
MOUNT WHITNEY (14,495)
SEQUOIA NATIONAL PARK
MINERAL KING AREA
Hammond
Three Rivers
ACCESS ROAD
198
SEQUOIA NATIONAL FOREST
INYO NATIONAL FOREST

The magnificence of the area is best described, however, not in these words but through pictures, several of which we have included as an appendix to this brief.

2. *History of Mineral King*

The Mineral King Valley did not feel the influence of man until the early 1870's when miners came in search of gold and silver. They found enough minerals for the area to have its name changed from Beulah to Mineral King. However, they did not find enough to support large commercial operations and by 1879 most mine owners had decided to leave the area.[4]

John Muir began in 1873 exploring the Kings Canyon and Sequoia areas. He persuaded Senator John F. Miller of California to introduce a bill in 1881 (S. 463, 47th Cong., 1st Sess.) which would have set apart "a public park and forest reservation for the benefit and enjoyment of the people."[5] The bill, which included not only Mineral King but all the areas now within Sequoia, Kings Canyon, and Yosemite National Parks, died in the Senate Public Lands Committee.[6]

In 1890, bills were introduced to establish Sequoia, General Grant, and Yosemite National Parks. These bills passed the Congress and became law. 26 Stat. 478, 651.

In 1891, John Muir turned his efforts to the enlargement of Sequoia National Park. He wrote an article entitled "A Rival of the Yosemite"[7] advocating an expansion of Sequoia which would have included Mineral King:

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[4]Leadabrook, *A Guidebook in the Southern Sierra Nevada Including Sequoia National Park, supra,* p. 22.

[5]Wolfe, Zinnie Marsh, *Son of the Wilderness: The Life of John Muir,* N.Y. 1945, p. 228.

[6]*Ibid.*

[7]*Century Magazine,* November, 1891.

> This region contains no mines of consequence, it is too high and too rocky for agriculture, and even the lumber industry need suffer no unreasonable restriction. Let our law-givers then make haste, before it is too late, to save this surpassingly glorious region for the recreation and well-being of humanity, and the world will rise up and call them blessed.

The following year, on May 28, 1892, John Muir met with a small group in San Francisco where together they started the Sierra Club. The Club was formally organized on June 4, 1892, with its purpose as stated in the "Articles of Incorporation": "To explore, enjoy and render accessible the mountain regions of the Pacific Coast; to publish authentic information concerning them; to enlist the support and cooperation of the people and the government in preserving the forests and other natural features of the Sierra Nevada Mountains."[8]

Meanwhile, on March 3, 1891, Congress enacted a bill granting the President authority to establish national forests on government-owned land. 26 Stat. 1103, 16 U.S.C. 471. President Harrison in 1893 created, pursuant to 16 U.S.C. 471, the Sierra Forest Reserve which included most of the area around the three parks including Mineral King. However, John Muir wrote in 1898:[9]

> This Sierra Reserve, proclaimed by the President of the United States in September, 1893, is worth the most thoughtful care of the government for its own sake, without considering its value as the fountain of rivers on which the fertility of the great San Joaquin Valley depends. Yet it gets no care at all. In the fog of tariff, silver, and annexation policies it is left wholly unguarded.

On February 1, 1905, a statute was passed, 33 Stat. 628, which moved administration of the national forests from the

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[8] *Sierra Club Handbook*, p. 60 (1969).

[9] *Atlantic Monthly*, January 1898, p. 27.

Department of the Interior, specifically the General Land Office, to the Department of Agriculture, which already had a Bureau of Forestry. This Bureau, which formerly had only an advisory role concerning national forests, became the Forest Service with complete administrative responsibility. The Sierra Forest Reserve was divided into national forests and the southern portion, including Mineral King, became Sequoia National Forest.[10]

The Sierra Club continued its efforts to enlarge Sequoia National Park to include Mineral King and other areas by writing in 1907 a report to the President, the Secretary of Agriculture, and the Chief Forester. Shortly thereafter, William E. Colby of the Sierra Club collaborated with Robert E. Marshall, the Chief Geographer of the United States Geological Survey, to produce a proposal for a much larger Sequoia National Park which included Mineral King.[11] In 1911, this proposal was introduced as a bill by Senator Frank P. Flint. S. 10895, 61st Cong., 3rd Sess. The bill was opposed, however, by Chief Forester Henry S. Graves on the ground that a national park service should be established before the creation of any new parks.[12]

In 1916, the National Park Service was established (39 Stat. 535, 16 U.S.C. 1) and a new bill was introduced to enlarge the park including Mineral King (H.R. 13168, 64th Cong., 1st Sess.). The Park Service and Forest Service argued throughout this period concerning which lands should and should not be in the park. The Forest Service objected to the inclusion of mineral and merchantable timber lands.[13]

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[10]Farquhar, Francis P., "Legislative History of Sequoia and Kings Canyon National Parks" *26 Sierra Club Bulletin* 42, 45 (1941).

[11]Strong, Douglas Hillman, *Trees or Timber: The Story of Sequoia and Kings Canyon National Parks,* Sequoia Natural History Association, 1964, pp. 41-43.

[12]Farquhar, "Legislative History of Sequoia and Kings Canyon National Parks," *supra,* p. 46.

[13]Strong, *Trees or Timber, supra,* p. 44.

Hearings were held on several occasions concerning enlargement of the park. At the hearings before the House Committee on Public Lands in 1919, Steven T. Mather, the Director of the National Park Service stated, "This bill was endorsed by the Sierra Club of California over five years ago. . . . It will . . . take in the great scenic country behind the present Sequoia Park." Hearings on H.R. 10929, January 21, 1919, 65th Cong., 3d Sess. 69. Mr. Mather went on to state that, in naming the enlarged park, the proposal of dedicating it to the president of the Sierra Club, John Muir, was considered but it was felt that Muir Woods and Muir Pass was sufficient use of the name Muir. *Id.* at 10. E.O. McCormick, then Vice-President of the Southern Pacific Railway, told the same committee that "I can remember when the country in question was almost inaccessible and [there was] only one map in existence—one hand-made map, the work of Mr. Joe Le Conte," who was one of the earliest members of the Sierra Club. *Id.* at 22.

The day after those hearings, the Boston *Evening Transcript* printed a long article favoring the passage of the bill. This article pointed out (January 22, 1919, pt. 2, p. 4):

> In later years California has bred a group of mountain rovers through the leadership of John Muir and the Sierra Club, whose president he was until his death, the members of which have explored the remotest sections of the high country and brought out tales of its superlative worthwhileness that have reached the ears of mountain-lovers the world over. It was these men and women who found and told of the glories of the mountainous regions to the east and north of the Sequoia and Grant Parks. They picked up and followed the disused trails of the old prospectors and forced a way where no trails existed. They found it a joyous place for spending a summer holiday, and saw in it the possibilities for making it a recreation ground for thousands where at most only dozens go today. And so began the agitation for extending the park boundaries to include the neighboring peaks and canyons.

The following year, H.R. 5006 was introduced which also would have included Mineral King in the park. 66th Cong., 2 Sess. At the hearings on the bill, Mr. Mather said, "I might state right here that the Sierra Club originally suggested that this proposed park in the boundaries as laid out there a considerable time before we took the question up in the Interior Department of the creation of the park." Hearings before the House Committee on Public Lands on H.R. 5006, February 24-26, 1920, 66th Cong., 2d Sess. 11. He then introduced Marian R. Parsons who was representing the Sierra Club. She inserted a letter into the record which stated (*ibid.*):

> At a special meeting of the directors of the Sierra Club last Monday, February 3, [1920,] the boundaries of the proposed Roosevelt National Park [the enlarged Sequoia National Park] were once more carefully considered and it was the unanimous opinion, concurred in by our special committee on national parks, that the boundaries should stand substantially as originally drawn by us. The southern boundary [which included Mineral King] also should, for scenic as well as administrative reasons remain substantially as originally outlined.

The Sierra Club's position regarding Mineral King was supported the next day of the hearings by H.M. Albright who was representing the Director of the Park Service (*id.* at 68-69):

> First, I would like to make a point clear that has not been emphasized and that is that the National Park Service did not originally outline those purple boundary lines [the boundary lines which included Mineral King]. They were drawn, years before the Park Service was created, by the Sierra Club and with the advice of John Muir, whom we all know to have been one of the greatest naturalists of his time. John Muir traveled over this country from the early days of California up to the time of his death. At various times he brought up the question of having a park established, and I think these lines were first

> drawn about 1911. . . . So this line, as I say, was drawn by those people who undoubtedly knew the mountains better than anybody else. The Sierra Club members probably know that area better now than any other living people. They go in there nearly every year, a Club of about 2,000 members, and they know every nook and corner of it; they know it better than even the Park Service does. . . . We would still feel like adhering to the boundary lines as drawn because these people have studied so much more thoroughly.

As regards Mineral King, Albright said (*id.* at 74-75):

> If this cut should be made here, taking out the Mineral King region, Franklin Pass and Farewell Gap, all of our means of access to the Kern region would be cut off. The Mineral King Valley is a natural course of roads or trails to the Kern. . . . That is all eliminated [by a Forest Service proposed cut] taking some of the most scenic parts of the park . . . so this southern region here gentlemen, ought to be included in the park by all means.

The Forest Service insisted that Mineral King be excluded from the proposed enlargement of the park. The sole reason for this insistence was that Chief Forester Graves felt that the mining activity around Mineral King should not be under the jurisdiction of the Park Service. He stated that "I have drawn the lines to exclude the mining camp of Mineral King. I do not think it should be in a park. . . . One of the differences between the national park and the national forest is the fact that the national forest is open to acquisition by private ownership under the mineral-land law. My own feeling is that this class of authority should not apply to national parks." *Id.* at 38. Due to this and other objections, all the bills to enlarge the park failed to pass.

In 1921, the head of the Park Service, Steven T. Mather, and the Chief Forester, William Greely, agreed that the Mount Whitney area would be included in the park but three southern townships, then within the existing park,

would be excluded.[14] This agreement was embodied in H.R. 7452, 67th Cong., 2d Sess., which, however, was defeated.

In response to the proposal to exclude the three southern townships, the Sierra Club suggested that the area be made a game preserve.[15] In May 1923, a meeting was held between the Forest Service, the Park Service, and the Sierra Club. At this meeting, it was agreed that Mineral King would be left out of the park but the Sierra Club again suggested that it should at least become a game refuge.[16] The Chief Forester agreed and that same year a bill was introduced that embodied this agreement. H.R. 4095, 68th Cong., 1st Sess. However, that bill also failed to pass.

Finally, in 1926, H.R. 9387 passed Congress and the Sierra Club achieved its goal of enlarging Sequoia National Park and preserving Mineral King as the Sequoia National Game Refuge. 44 Stat. 821, 16 U.S.C. 688. The House Report acknowledged the battle and victory of the Sierra Club stating, "This project embodied the ideas of John Muir, Professor Joseph Le Conte, and other prominent western men belonging to the Sierra Club of California, who had been in many years of intimate contact with the High Sierra." H. Rep. No. 902, 69th Cong., 1st Sess. 3.

I

THE SIERRA CLUB HAS STANDING TO BRING THIS ACTION

The complaint filed by the Sierra Club stated that the Sierra Club had approximately 78,000 members, of whom approximately 27,000 lived in the San Francisco Bay area (R. 4). It then alleged (R. 4):

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[14]Strong, *Trees or Timber, supra*, p. 44.

[15]11 *Sierra Club Bulletin* 324.

[16]Strong, *Trees or Timber, supra*, p. 44.

> For many years the SIERRA CLUB by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested. One of the principal purposes of the SIERRA CLUB is to protect and conserve the natural resources of the Sierra Nevada mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved as hereinafter more fully appears.

The district court held that these allegations gave the Sierra Club standing to bring the action (R. 197). The court of appeals reversed, with Judge Hamley dissenting as to standing (R. 223-224, 234-235). The court recognized the standing of "local conservationist organizations made up of local residents and users of the area affected by the administrative action" (R. 224). However, it distinguished the Sierra Club on the ground that "there is no allegation in the complaint that members of the Sierra Club would be affected by the actions of defendants-appellants other than the fact that the actions are personally displeasing or distasteful to them" (R. 223).

This Court has held that the standing of plaintiffs to challenge the action of federal agencies and officials has two elements. First, the plaintiff must allege that "the challenged action has caused him injury in fact, economic or otherwise." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152 (1970).

Second, the plaintiff must show that "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153; *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6-7 (1968).

In determining whether these standards have been met, we submit that this Court should follow the principles enunciated by the Court of Appeals for the District of

Columbia Circuit in *Office of Communication of United Church of Christ v. Federal Communications Commission*, 359 F.2d 994, 1003-1004 (1966):[17]

> The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of these assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it. The gradual expansion and evaluation of concepts of standing in administrative law attests that experience rather than logic or fixed rules has been accepted as the guide.

In *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859, 869 (C.A. D.C., 1970), the court of appeals stated that "we think it time that such doubts [as to standing] were resolved in favor of hearing cases in which the public interest demands a hearing on the merits."

Similarly, we cannot assume any longer that government officials will represent the public in protecting the environment without the participation of organizations specifically devoted to this purpose. We believe that the law of standing should be liberally construed to reflect this awareness.

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[17]While the *United Church of Christ* case involved intervention before the Federal Communications Commission, the court of appeals relied on both standing and intervention cases and assumed that these standards were identical. 359 F.2d at 1000, note 8.

A. The Interests Plaintiff Seeks To Protect Are Arguably Within the "Zone of Interests" Protected by the Statutes Upon Which It Relies

There can be no doubt that the interests plaintiff seeks to protect are arguably within the zone of interests protected by the statutes on which it relies. Plaintiff makes four contentions, each of which is based on federal statutes designed to protect Sequoia National Game Refuge, Forest, or Park.

First, 16 U.S.C. 688 allows the Secretary of Agriculture to permit use of lands in Sequoia National Game Refuge only "so far as they may be consistent with the purposes for which said game refuge is established." Section 688 states that the purpose of the refuge is "to protect from trespass the public lands of the United States and the game animals which may be thereon." The use of 13,000 acres of Mineral King for a ski and summer resort is inconsistent with this purpose of the refuge. Since plaintiff is a conservation organization attempting to protect the animals of the refuge, its interest is within the zone of interests protected by the statute.

Second, 16 U.S.C. 497(a) allows the Secretary of Agriculture to grant permits for constructing resorts in national forests only for 80 acres. This statute precludes the Secretary from issuing a permit for 13,000 acres such as he plans to grant in this case (R. 31). Section 497(a) is one of several provisions which allow the use of land in national forests for homes, schools, churches, commercial and other purposes, but which restrict the amount of land which can be used to from 2 to 80 acres in order to protect the forests. 16 U.S.C. 497(b), (c), (d), 479. For Congress established the national forests for "national and public purposes" (*Light v. United States*, 220 U.S. 523, 537 (1911)) "under the conservation policy of the government" (*Chicago, M. & St.P. Ry. v. United States*, 218 Fed. 288, 293 (C.A. 9, 1914), affirmed, 244 U.S. 351). Furthermore, the statute upon

which the Secretary of Agriculture bases his purported right to issue revocable permits beyond 80 acres, 16 U.S.C. 551, gives the Secretary power only to issue rules and regulations in order "to preserve the forests thereon from destruction." Since plaintiff is a conservation organization attempting to protect the forests, its interest is within the zone of interests protected by these statutes.

Third, 16 U.S.C. 1 provides that the "fundamental purpose" of national parks is "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. 43, 45b, and 61 require the Secretary of Interior to preserve the trees, scenic beauty, and other aspects of Sequoia National Park in its natural condition. The action of the Secretary of Interior in permitting the building of a highway across the park which will damage the park and serve the new resort is inconsistent with these statutes. Since plaintiff is a conservation organization attempting to protect the scenery, natural objects, wildlife, and enjoyment by the public of the park, its interest is within the zone of interests protected by the statutes.

Fourth, 16 U.S.C. 45c provides that no electric "transmission lines . . . for the . . . transmission . . . of power within the limits of [Sequoia National Park] shall be granted or made without specific authority of Congress." The action of the Secretary of Interior in allowing the building of a major transmission line across the park to serve the new ski and summer resort violates this section. The purpose of this statute is plainly to prevent harm to the park and interference with the purposes of it. Since plaintiff is a conservation organization attempting to protect these purposes, its interest is within the zone of interests protected by the statute.

Since plaintiff is clearly within the zone of interests protected by these statutes, the sole question is whether it has suffered the degree of harm necessary to bring suit.

B. Plaintiff Has Suffered Injury of the Kind Which Gives It a Personal Stake in the Controversy and Which Assures Concrete Adverseness

We submit that the Sierra Club has standing on four distinct grounds. First, national conservation organizations with strong interest in the protection of the environment have standing to bring suit under federal statutes designed to prevent its destruction.

Second, the Sierra Club is also a local conservation organization with a special long standing interest in Mineral King and Sequoia National Park. It therefore has standing even if national conservation organizations generally lack standing to sue.

Third, the Sierra Club has standing to represent its 78,000 members who as American citizens have a direct interest in protecting the magnificent scenery, beautiful fauna, and wild animals of Sequoia National Refuge, Forest, and Park from despoilment, since they are reserved in trust for the benefit of all Americans.

Fourth, the Sierra Club has standing as itself a user of this area by regularly running camping trips into it and as the representative of its members who are users of the wildlife refuge and park.

Finally, if the Court finds that any of these arguments is not fairly encompassed within the standing allegations of the complaint or depends on evidence not in the record, the cause should be remanded to the district court to allow the complaint to be amended and an evidentiary hearing to be held.

1. *The Sierra Club Has Standing As a National Conservation Organization Interested in Protecting the Environment*

a. Constitutional Limitations

Any analysis of standing must start with Article III of the Constitution which gives the federal courts jurisdiction

only over "cases" and "controversies." However, as this court explained in *Flast v. Cohen*, 392 U.S. 83, 91-97 (1968), it is unclear how much the rules of standing are based on Article III and how much on considerations on policy. The Court noted that *Frothingham v. Mellon*, 262 U.S. 447 (1923), and subsequent cases are based on a mixture of constitutional and non-constitutional reasoning. These policy limitations are "not always clearly distinguished from the constitutional limitation." *Flast v. Cohen, supra*, 392 U.S. at 97; *Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

In *Baker v. Carr*, 369 U.S. 186, 204 (1962), this Court held that standing requires "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Similarly, after lengthy analysis, the Court in *Flast v. Cohen, supra*, 392 U.S. at 101, held that "in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." The Court explained an adversary context as where (*id.* at 106):

> The questions will be framed with the necessary specificity, . . . the issues will be contested with the necessary adverseness and . . . the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution. We lack that confidence in cases such as *Frothingham* where a taxpayer seeks to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System.

Accord, *Jenkins v. McKeithen*, 395 U.S. 411, 423 (1969); *Association of Data Processing Service Organizations, Inc. v. Camp, supra*, 397 U.S. at 152, 172 (majority and concurring opinions).

In recent years, the courts have relaxed the requirements concerning the personal stake which a plaintiff must demonstrate to show concrete adverseness. In *National Automatic Laundry Cleaning Council v. Schultz*, C.A.D.C., decided March 31, 1971, the court of appeals held that "even a minuscule pecuniary stake of the litigant may be sufficient" since recent decisions "have struct the fetters of the prior judicial inhibitions and restraints."

Concrete adverseness is often assured by the economic harm which the plaintiff has suffered and its corresponding economic interest in the outcome of the litigation. However, this Court has specifically held that the plaintiff's interest "may reflect 'aesthetic conservational, and recreational' as well as economic values. A person or a family may have a spiritual stake in First Amendment values sufficient to give him standing to raise issues concerning the Establishment Clause and the Free Exercise Clause." *Id.* at 154. Accord, *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 615-616 (C.A. 2, 1965), certiorari denied, 384 U.S. 941; *Office of Communication of United Church of Christ v. Federal Communications Commission*, *supra*, 359 F.2d at 1000-1007. Thus, conservational values of the kind involved in this case are fully adequate to serve as the basis for standing.

Plaintiff clearly satisfied the constitutional requirements for standing. The concrete adversariness of the Sierra Club in cases involving despoilment of the environment can hardly be a matter of dispute. Since the issues it raises are specific, it is not complaining generally about the conduct of government. Beginning in 1965 when it requested a hearing on three different occasions (R. 26, 41-45, 46, 47), it has opposed the development vigorously and consistently.

The Sierra Club is one of the largest conservation organizations in the country; it has 78,000 members (R. 4) organized in local chapters who paid over $1 million in dues in 1970. *Sierra Club Bulletin*, February 1971, p. 21. Since

1902 when its first pack trip went into the Sierra Nevadas, the Club has run nature trips throughout the country. The Club has a campus program which assists in organizing and supplying information to student environmental groups. The Club publishes numerous books on nature and conservation issues through its *National News Report* and the *Sierra Club Bulletin*. Currently the Sierra Club is a plaintiff in 19 suits all over the country involving efforts to protect wilderness in Colorado, the San Francisco Bay from fill, a lake in Florida from a highway, the Gila River of Arizona from channelization, a marsh in Pennsylvania from a road project, an alpine lake in Washington from a mining operation, and other abuses of the environment. The Club is also an intervenor in 9 cases and an *amicus curiae* in 10 other environment cases. *Sierra Club Bulletin*, January, 1971, pp. 28-29.

The Court of Appeals for the Second Circuit has said that the Sierra Club is a "national conservation organization with substantial membership . . . and a history of involvement in the preservation of national scenic and recreational resources." *Citizens Committee for Hudson Valley v. Volpe*, 425 F.2d 97, 103 (1970), certiorari denied, No. 615, this Term. The district court specifically found, by upholding the standing paragraph of the complaint, that the Sierra Club for many years has had a special interest in conservation and the protection of the national parks, game refuges, and forests and that one of its principal purposes is to protect the resources of the Sierra Nevada Mountains (R. 4, 197).

Such a plaintiff has the "concrete adverseness which sharpens the presentation of issues" far more than any ordinary plaintiff. The court of appeals conceded (R. 224) and numerous cases hold (see p. 62 below) that any local resident who uses an area can sue to protect it from despoilment. Such a user may simply use it for occasional camping or hiking and he may only have had an interest for a few years. He may have little in the way of resources to provide fully adequate representation.

In contrast, a national conservation organization, like the Sierra Club, will generally have adequate resources. It will have demonstrated its interest in protecting the environment either by conducting activities over a long period of time (like the Sierra Club, Wilderness Society, and Izaak Walton League) or by starting major programs more recently (like Friends of the Earth). In either event, the court will have maximum assurance that there will be a "case" or "controversy" before it.

In *Office of Communication of United Church of Christ v. Federal Communications Commission, supra,* 359 F.2d at 1002, the court of appeals stated in upholding the standing of a national church organization:

> Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listen-in audience.

We submit that national conservation organizations have an equally deep concern with the environment as the church organization had with broadcasting in that case.

b. Non-Constitutional Limitations

This Court has suggested that several non-constitutional policy reasons also limit the standing of plaintiffs to sue in the federal courts. In *Frothingham v. Mellon, supra,* 262 U.S. at 486-487, the Court said that the plaintiff, a federal taxpayer, had a "comparatively minute and indeterminable" interest in federal tax revenues. It also indicated that the courts might be flooded with suits "in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned." *Id.* at 487. See *Flast v. Cohen, supra,* 392 U.S. at 93.

Neither of these policy considerations militate against standing in this case. Moreover, an additional policy reason, the lack of any other persons with a better claim to standing in many environment cases, affirmatively supports the standing of national conservation organizations.

Substantiality of Plaintiff's Interest. As we have seen pp. 36-37), the interest of the Sierra Club in protecting the environment from despoilment is hardly minute. It has had a substantial interest since its founding in 1892. The substantiality of its interest strongly supports a finding of standing.

Burden on the Courts. The right of the Sierra Club and other national conservation organizations to bring suit adds no substantial burden on the federal courts. Only a handful of such organizations exist and they do not have the resources to bring more than a few dozen federal suits a year. Indeed, the number is still far too small to challenge more than a handful of the actions of government agenices and private corporations which have serious effects on the environment.

The more relaxed rules for intervention before federal agencies and for standing in the courts have not overburdened them. As the Court of Appeals for the Second Circuit noted in *Scenic Hudson Preservation Conference v. Federal Power Commission, supra,* 354 F.2d at 617, "our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken." Similarly, *Associated Industries, Inc. v. Ickes,* 134 F.2d 694, 707 (C.A. 2, 1943), vacated as moot, 320 U.S. 707, rejected the possibility of the courts being overburdened by thousands of cases by stating that "no such horrendous possibilities exist." And more recently in *Scanwell Laboratories, Inc. v. Shaffer, supra,* 424 F.2d at 872, the court said that:

> The spectre of opening a Pandora's box of litigation has always seemed groundless to us, particularly in the area of standing to sue. Certainly the hue and cry went up when the states relaxed the criteria

> for standing to sue; but so far the dockets in the states have not increased appreciably as a result of new cases in which standing would previously have been denied.

Accord, *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 738 (C.A. D.C., 1970).[18]

Since the court of appeals recognized that local conservation organizations and users had standing and could have brought suit, the court's holding, as applied to this and similar cases, would not reduce the number of cases brought in the federal courts. Indeed, national conservation organizations, in contrast to most small local groups and individuals, have the broader outlook to analyze situations more carefully before they litigate and to bring only the strongest cases. As the court of appeals said in *Office of Communication of the United Church of Christ v. Federal Communications Commission, supra*, 359 F.2d at 1005, with relation to a national church organization, such "responsible and representative groups . . . usually concern themselves with a wide range of community problems and tend to be representatives of broad as distinguished from narrow interests, public as distinguished from private or commercial interests." Thus, if standing is denied national organizations and confined to local groups and individuals, this may simply encourage

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[18]Professor Kenneth Culp Davis has written (The Liberalized Law of Standing, 37 *U. of Chi. L. Rev.* 450, 471):

> [E]xperience of the federal courts . . . shows that floods of litigation do not result when the judicial doors are opened to all. A 1953 case [*Reade* v. *Ewing*, 205 F.2d 630 (C.A. 2, 1953)] held that a "consumer"—anyone who eats—has standing to challenge action of the Food and Drug Administration; if consumers have brought many cases, they must all be unreported. Many statues, including the Food and Drug Act and the Communications Act, have long provided specifically for standing of "any person adversely affected" but litigation under these statutes seems to be no more voluminous than litigation under other statutes. Half or more of the specific statutes are as broad . . . but the litigation is in dribbles, not floods.

more, less well prepared, and less meritorious actions. On the other hand, "representation of common interests" by an organization such as the Sierra Club may serve to limit the number of those who might bring suit. *Scenic Hudson Preservation Conference v. Federal Power Commission, supra,* 354 F.2d at 617; *National Welfare Rights Organization v. Finch, supra,* 429 F.2d at 739; *Powelton Civic Home Owners' Ass'n v. Department of Housing and Urban Development,* 184 F.Supp. 809, 828, note 11 (E.D. Pa., 1968). Thus, the right of national environment organizations to bring suit may often reduce the burden on the federal courts.

Lack of Anyone Else With a Better Claim to Standing. While in this case local users could well have brought suit—indeed, as we will argue below (pp. 62-63), the Sierra Club itself in a user and represents members who are users—there are suits which under the decision of the court of appeals could not have been brought at all. Environment cases increasingly raise issues which do not involve, or only incidentally involve, direct users: The protection of wilderness areas, the preservation of wildlife refuges, the survival of rare and endangered species, the integrity of natural rivers, and the natural or scenic aspect of landscape. Those who bring such suits may incidentally be users in that they or their members have walked, watched and beheld the subject of the litigation. However, such use is often incidental to the larger purpose to protect the integrity of the environment. And if the only persons with standing are users, no one will have standing where there is no present use (such as a suit to preserve the wilderness) or no use is possible (such as a suit to prevent the chemical poisoning of eagles).[19]

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[19]The following cases involve either no possible uses or, while possible, use is minimal:

Wilderness Society v. Hickel, D. D.C., decided April 23, 1970 (1 Environment Reporter 1335) (Alaska pipeline case involving the Alaska wilderness).

Parker v. United States, 307 F. Supp. 688, 309 F. Supp. 593 (D. Colo., 1969), on appeal to the Tenth Circuit (protection of forest wilderness).

(continued)

Even where there are users, they may be unwilling to sue. Nearby resident-users of a wilderness area may desire develop-

West Virginia Highland Conservancy v. Island Creek Coal Co., C.A. 4, decided April 6, 1971 (involving despoilment of a possible wilderness area).

Citizens Commission for the Columbia River v. Resor, D. Ore., No. 69-498 (protection of a wildlife refuge and Columbia River from fill to build an airport).

Alpine Lakes Protection Society v. Hardin, W. D. Wash., No. 885 (protection of national forest from motorized travel via trail).

Izaak Walton League v. St. Clair, 313 F. Supp. 1312 (D. Minn., 1970 (protection of wilderness area from mineral exploration).

Gandt v. Hardin, W. D. Mich., decided December 11, 1969 (protection of wilderness qualities of a forest).

Thermal Ecology Must be Preserved v. Atomic Energy Commission, 433 F.2d 524 (C.A. D.C., 1970) (protection of fish and aquatic environment from thermal pollution from atomic power plants).

EDF v. Corps of Engineers, E. D. Ark., decided February 19, 1971 (2 Environment Reporter 1260) (protection of fish and aquatic birds from a proposed dam).

EDF v. Corps of Engineers, D. D.C., decided January 27, 1971 (2 Environment Reporter 1173) (protection of birds, fish, and forests from cross-Florida barge canal).

Sierra Club v. Laird, D. Ariz., decided June 23, 1970 (1 Environmental Law Reporter 20085) (protection of fish and other wildlife from channel clearing).

Association of Northwest Steel Headers v. Corps of Engineers, E. D. Wash., Civ. No. 3362 (protection of fish and Snake River from a dam).

Sierra Club v. Hardin, D. Alaska, decided March 30, 1971 (2 Environment Reporter 1385) (preservation of a national forest, including nesting grounds of bald eagle).

EDF v. Corps of Engineers, D. D.C., Civ. No. 1722-70 (prevention of DDT discharge into waters flowing into wildlife refuge).

Texas Committee on Natural Resources v. United States, W.D. Tex., decided February 5, 1970 (1 Environment Reporter 1303), affirmed on other grounds by Fifth Circuit, August 25, 1970 (protection of last habitat of rare golden-cheeked warbler).

Stewart v. Resor, E.D. Pa., Civ. No. 70-551 (stopping highway to protect fish and wildlife).

Pennsylvania Environmental Council v. Bartlett, 315 F. Supp. 238 (M.D. Pa., 1970), on appeal to the Third Circuit (protection of fish and wildlife from a highway).

ment because of the economic benefits which will result.[20] National conservation organizations may be the only parties who will represent the national, as contrasted to local, interest by opposing development. This conflict between local and national interests is particularly obvious and significant with regard to national parks, wildlife refuges, and forests which must be preserved even if local residents desire to develop them.

Furthermore, as the statute establishing the National Park Service makes clear, the purposes for which the national parks are created is "to conserve the scenery and the national and historic objects and the wildlife therein. . . ." 16 U.S.C. 1. Similarly, 16 U.S.C. 688 provides that the purpose of the Sequoia Game Refuge is "to protect from trespass the public lands of the United States and the game animals which may be thereon." And 16 U.S.C. 551, upon which the Secretary of Agriculture bases his power to issue the revocable permit for use of 13,000 acres, allows him only to make rules and regulations "to preserve the forests thereon from destruction." It follows that conservationists must have standing to protect the national interest in preserving the national

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Humane Society of the U.S. v. Russell, D. D.C., Civ. No. 3627-70 (protection of deer in a wildlife refuge from a deer hunt).

Save America's Vital Environment, Inc. v. Irwin, N.D. Ga., Civ. No. 14700 (protection of birds and fish from fire and eradication program using the pesticide mirex).

National Audubon Society v. Johnson, 317 F. Supp. 1330 (S.D. Tex., 1970), appeal dismissed by Fifth Circuit) (protection of marine life and especially whooping crane from dredging of oyster shells).

In addition, several cases concerning pesticides involve protection of animals and birds as well as man and presumably would have been brought even if only animals were affected. *Environmental Defense Fund v. Finch,* 428 F.2d 1083 (C.A.D.C. 1970) (DDT), *Environmental Defense Fund v. Hardin,* 428 F.2d 1093 (C.A.D.C. 1970) (DDT); *Wellford v. Ruckelshaus,* C.A.D.C., decided January 7, 1971 (2 Environment Report 1123) (2, 4, 5-T).

[20]It is for this reason that Tulane County has supported the defendants in this litigation.

parks, game refuges, and forests for these purposes which do not involve use.

The petitioner—the Sierra Club—and the four amici curiae supporting the petitioner—the Wilderness Society, Friends of the Earth, the Isaak Walton League, and the Environmental Defense Fund[21]—all have as their principal interest the protection and conservation of the environment. While the Sierra Club, Wilderness Society and the Isaak Walton League are also interested in appropriate uses of natural areas consistent with conservation of the environment, this is not their principal interest. They should not be required to assert this subsidiary interest in order to obtain standing to prevent despoilment of the environment. The other two organizations do not represent users at all and cannot assert standing on that basis.

If these organizations and other non-users were denied standing to challenge government actions where no users exist or are involved only incidentally, this would of course slightly reduce the number of cases in the federal courts. But no policy justifies standing requirements which eliminate any possible plaintiff so that agency actions could not be challenged in the courts for having violated federal statutes. This and other courts have consistently relied on the lack of any other persons with a better claim to standing in upholding the standing of plaintiffs then before the court.

In *Federal Communications Commission v. Sanders Bros. Radio Stations*, 309 U.S. 470, 477 (1940), this Court gave us as one reason for permitting a radio station to challenge the grant of a license to a competitor that the radio station would likely be "the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission. . . ." In *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64, note 6 (1963), the Court upheld the standing of a publisher of books to challenge the

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[21]The Environmental Defense Fund has filed a separate brief supporting the petitioner.

constitutionality of a statute directed at distributors because the "pragmatic considerations argue strongly for the standing of publishers in cases such as the present one." These considerations consisted of the likelihood that publishers would be more likely to sue than distributors and "unless [the publisher] is permitted to sue, infringements of freedom of the press may too often go unremedied." *Ibid.* Similarly, in *Office Communication of the United Church of Christ v. Federal Communications Commission, supra,* 359 F.2d at 1004-1005, the court upheld the standing of listeners in part because they are likely to be the only ones to challenge programming deficiencies and overcommercialization in radio and television license renewals before the Commission. Accord, *Pittsburgh v. Federal Power Commission,* 237 F.2d 741, 746 (C.A. D.C., 1956); *Scanwell Laboratories, Inc. v. Shaffer, supra,* 424 F.2d at 863-865; *Powelton Civic Home Owners' Assn. v. Department of Housing and Urban Development, supra,* 284 F.Supp. at 827; *Sierra Club v. Hardin* D. Alaska, decided March 30, 1971 (2 Environment Reporter 1385, 1392).

c. Statutory Aids to Standing

Congress of course cannot permit suits to be brought in federal courts which do not involve cases or controversies. *Muskrat v. United States,* 219 U.S. 346 (1911). Congress, however, can (1) help to define when a case or controversy exists and (2) override non-constitutional policy limitations on standing. As Judge Frank stated in the leading case of *Associated Industries v. Ickes, supra,* 134 F.2d at 704, which examined at length the right of plaintiffs to sue as private Attorneys General:

> While Congress can constitutionally authorize no one, in the absence of an actual justificable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute upon govern-

> ment officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

Accord, *Reade v. Ewing*, 205 F.2d 630, 632 (C.A. 2, 1953). The court in *Associated Industries* pointed to *United States ex rel., Marcus v. Hess*, 317 U.S. 537 (1943), which affirmed a judgment under the Federal Informers Act in favor of a private citizen who had not himself been defrauded but who had sued for fraud on behalf of the government.

Although in the present case Congress has not passed a statute specifically authorizing national conservation organizations to bring suit, both the Administrative Procedure Act and National Environmental Policy Act strongly support the standing of national conservation organizations in challenging the actions of federal officials.

Administrative Procedure Act. Plaintiff brought suit under the Administrative Procedure Act (R. 3), which provides (5 U.S.C. 702):

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency

> action within the meaning of a relevant statute, is entitled to judicial review thereof.

The Act has clearly expanded the standing of persons to bring suits in the federal courts. As this Court stated in *Association of Data Processing Service Organizations, Inc. v. Camp, supra,* 397 U.S. at 154:

> Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved "persons" is symptomatic of that trend.

While some earlier cases have construed the Administrative Procedure Act to add little or nothing to the existing law of standing (*e.g., Pennsylvania Railroad Co. v. Dillon,* 335 F.2d 292, 294-95 (C.A. D.C., 1964)), more recently the courts have generally held that the Act "reenforces a judicial trend liberalizing standing . . . ." *Curran v. Laird,* 420 F.2d 122 (C.A. D.C., 1970) (*en banc*). Accord, *Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920, 933, note 25 (C.A. 2, 1968); *Scanwell Laboratories, Inc. v. Shaffer, supra,* 424 F.2d at 865-870; *Triangle Improvement Council v. Ritchie,* 314 F. Supp. 20, 27-28 (S.D. W. Va., 1969), affirmed, 429 F.2d 423 (C.A. 4), pending on writ of certiorari, No. 712, this Term. Similarly, in *Ballerina Pen Co. v. Kunzig,* 433 F.2d 1204, (C.A. D.C., 1970), the court of appeals upheld standing because of the basic purpose of the Administrative Procedure Act to assure that federal agencies, whose powers have such a far-reaching effect on citizens, complied with the will of Congress: "[A]n impartial court is required to ascertain the degree of delegation of authority the Congress intended and to determine whether the agency in question has exceeded the bounds of its delegated authority." *Id.* at 1208.

This liberal construction of the Administrative Procedure Act with regard to standing is consistent with numerous decisions of this Court. In *Wong Yang Sung v. McGrath,* 339 U.S. 33, 36 (1950), the Court reviewed at length the

background of the Act because "determination of questions of its coverage may well be approached through consideration of its purpose as disclosed by its background." The Court, noted that "the conviction developed . . . that [the administrative] power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use." *Id.* at 37. The Court concluded that "it would be a disservice to our form of government and to the administrative process itself if the courts should fail, so far as the terms of the act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." *Id.* at 41.

Subsequently, in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), this Court considered the scope of review under the Administrative Procedure Act. It stated that earlier cases "have been reinforced by the enactment of the Administrative Procedure Act . . . . The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed this theme by noting that the Administrative Procedure Act's 'general review provisions' must be given a 'hospitable' interpretation." *Id.* at 140-141. And in *Chicago v. United States*, 396 U.S. 162, 164 (1969), this Court said that "we start with the prescription that aggrieved persons may obtain review of administrative decisions unless there is 'persuasive reason to believe' that Congress had no such purpose." Accord, *Heikkala v. Barber*, 345 U.S. 229, 232-233 (1953); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955); *Rusk v. Cort*, 369 U.S. 367, 379 (1962); *Association of Data Processing Service Organizations, Inc. v. Camp*, *supra*, 397 U.S. at 157; *Barlow v. Collins*, 397 U.S. 159, 165 (1970); *Tooahnippah v. Hickel*, 397 U.S. 598, 606 (1970); *Citizens to Preserve Overton Park, Inc. v. Volpe*, No. 1066, this Term, decided March 2, 1971.

While none of these cases specifically involved standing, there is no reason why 5 U.S.C. 702, the standing provision of the Act, should receive any narrower, less hospitable interpretation than any of its other provisions and particularly those relating to judicial review.

National Environmental Policy Act. The National Environmental Policy Act declares that it is "national policy," *inter alia,* "to promote efforts which will prevent or eliminate damage to the environment" (42 U.S.C. 4321) and federal policy to use "all practical means and measures" to protect the environment in cooperation with "concerned public and private organizations" (*id.* at 4331(a)). Russell E. Train, the Chairman of the President's Council on Environmental Quality, which was established by the Act and has the responsibility to ensure that the Act is complied with (42 U.S.C. 4321, 4344; Exec. Order No. 11514(13), 35 Fed. Reg. 4247) has stated that (1 Environment Reporter 745):

> Private litigation before courts and administrative agencies has been and will continue to be an important environmental protection technique supplementing and reenforcing government environmental protection programs.

The Council has itself specifically noted with approval judicial decisions which upheld the standing of national conservation organizations. 1 Environment Reporter 746.

Even more specifically, the Legal Advisory Committee to the Council unanimously passed a resolution in the fall of 1970 (quoted in Statement by Timothy Atkeson, General Counsel, Council on Environmental Quality, before the Subcommittee on the Environment of the Senate Committee on Commerce, April 15, 1971):

> Where an organization or group of citizens devoted to, or with a demonstrated interest in environmental protection asserts a claim against an agency of the Government in reliance on the provisions of the National Environmental Policy Act, or of other legislation designed to protect the environment, the interposition by the Government of the defense of lack of standing is inconsistent with the federal environmental policy, as exemplified in the National Environmental Policy Act and in other legislation.

The Council on Environmental Policy has itself adopted this position. *Ibid.*

Thus, the Council on Environmental Policy has concluded that the National Environmental Policy Act provides standing for conservation organizations, like the Sierra Club, which assert claims under statutes, like those in this case. This interpretation by the federal agency charged with administering the Act is entitled to great weight as to its meaning. *E.g., Udall v. Tallman,* 380 U.S. 1, 16 (1965). And the Act, in turn, provides support for the courts in upholding the standing of national conservation organizations in asserting claims under statutes designed to protect the environment.

d. Judicial Decisions

The Court of Appeals for the Ninth Circuit has held in this case that national environment organizations have not been sufficiently injured to have standing to bring this suit.[22] This decision is inconsistent with the views of every other court which has specifically or implicitly ruled on this issue.

Earlier, this year, this Court held that federal highways could not be built through public parks if a feasible alternative route existed. *Citizens to Preserve Overton Park, Inc. v. Volpe,* No. 1066, this Term, decided March 2, 1971. The Court specifically noted that petitioners were "private citizens as well as local and national conservation organizations . . . ." The national organizations were the Sierra Club and Audubon Society. Since standing, at least insofar as the constitutional requirements of Article III are concerned, involves jurisdiction, the decision in the *Overton Park* case at least implicitly supports the standing of national conservation organizations to sue to protect the environment.

The holding of the court of appeals in this case is in square conflict with decisions of two other circuits and several

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[22] In a subsequent case, *Alameda Conservation Ass'n v. California,* 437 F.2d 1087 (1971) (Judge Merrill dissenting), certiorari denied, No. 1300, this Term, the Ninth Circuit held that a local conservation organization did not have standing to protect San Francisco Bay from fill although eight individuals living near the Bay did have standing.

district courts. The court below specifically rejected (R. 224, note 9) the holding in *Citizens Committee for the Hudson Valley v. Volpe*, 425 F.2d 97 (C.A. 2, 1970), certiorari denied, No. 615, this Term, that national conservation organizations, and specifically the Sierra Club, have standing. In contrast to the Ninth Circuit's holding, the Second Circuit explicitly upheld the Sierra Club's standing on the ground that the Club and the other plaintiffs (*id.* at 102):

> made no claim that the proposed Expressway or the issuance of the dredge and fill permit threatened any direct personal or economic harm to them. Instead they asserted the interest of the public in the natural resources, scenic beauty and historical value of the area immediately threatened with drastic action, claiming that they were "aggrieved" when the Corps acted adversely to the public interest. They are . . . serving as "private Attorney Generals" to protect the public interest.

The court then explained (*id.* at 103):

> [Plaintiffs] have evidenced the seriousness of their concern with local natural resources by organizing for the purpose of cogently expressing it, and the intensity of their concern is apparent from the considerable expense and effort they have undertaken in order to protect the public interest which they believe is threatened by official action of the federal and state governments. In short, they have proven the genuineness of their concern by demonstrating that they are "willing to shoulder the burdensome and costly processes of intervention" in an administrative proceeding . . . . They have "by their activities and conduct . . . exhibited a special interest" in the preservation of the natural resources of the Hudson Valley.

Similarly, the decision below is in conflict with *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1097 (C.A. D.C., 1970), where the court held that national conservation organizations had standing to attack the continued marketing of DDT:

> [T]he consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem.
>
> On the basis of petitioners' uncontroverted allegations, it appears that they are organizations with a demonstrated interest in protecting the environment from pesticide pollution. Therefore they have the necessary stake in the outcome of a challenge to the Secretary's inaction to contest the adverseness required by Article III of the Constitution.

The national organizations whose standing was upheld included the Environmental Defense Fund, the Izaak Walton League, the National Audubon Society and the Sierra Club, the plaintiff in this case. Accord, *Environmental Defense Fund, Inc. v. HEW*, 428 F.2d 1083, 1085, note 2 (C.A. D.C., 1970).

Several district courts have also upheld the standing of national conservation organizations. In *EDF v. Corps of Engineers*, E.D. Ark., decided Feb. 19, 1971 (2 Environment Reporter 1260), the district court upheld the standing of the Environmental Defense Fund and three Arkansas conservation organizations to bring suit to enjoin the construction of a dam because of its environmental effects. The court noted that (2 Environment Reporter at 1281):

> They are all nonprofit organizations composed of members who have a sincere and vital common interest in protecting those environmental values which they deem to be most important to this, and future, generations of American citizens. It is true they have no direct and personal economic interest in the Cossatot River or the lands lying adjacent thereto, but these organizations wish to represent what they deem to be "public" interest in this river and its environs. Each of the organizations has demonstrated its interest in such matters as that represented by this lawsuit.

After reviewing the recent changes in the federal law of standing, the court held that the rationale of this Court's recent decisions (*id.* at 1283):

> if not the precise holdings, clearly indicates that such plaintiff organizations . . . have standing to sue. There can be no doubt that the corporate plaintiffs are interested and antagonistic enough to present the issues vigorously and with the "concrete adverseness" referred to in *Baker v. Carr*. . . . Furthermore, . . . the National Environmental Policy Act of 1969 makes clear the recognition by Congress of the important role of such private organizations to cooperate with "concerned . . . private organizations" to further the policies of the Act.

In *Izaak Walton League v. St. Clair*, 313 F. Supp. 1312, 1316 (D. Minn., 1970), the court upheld the standing of a national conservation organization to enjoin drilling for and removing minerals from a wilderness area:

> Clearly here the plaintiff, Izaak Walton League, will present the case in "an adversary context." The League has a long history of activity in conservation matters and natural resource preservation. . . . There is no doubt in the court's mind that plaintiff actively will pursue in an adversary way the prosecution of this suit and has:
>
> > alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? 369 U.S. 186, at 204 . . . in Baker v. Carr.
>
> There will be no collusive suit nor a mere nominal presentation.

The court said further that the League is "not a 'johnny-come-lately' or an *ad hoc* organization and its interest in the wilderness movement is continuing, basic and deep. It therefore has an 'aesthetic, conservational and recreational' interest to protect." *Id.* at 1317. Accord, *Parker v. United States*, 309 F. Supp. 593 (D. Colo., 1970) (upholding, *inter alia*,

the standing of the Sierra Club because plaintiffs "have special interest in the values which Congress sought to protect by enacting" the statutes relied upon); *Wilderness Society v. Hickel*, D. D.C., decided April 23, 1970 (1 Environment Reporter 1335, 1337); *EDF v. Corps of Engineers*, D. D.C., decided January 27, 1971 (2 Environment Reporter 1173, 1174) (upholding the standing of the Environment Defense Fund because "through their research and other activities [they] have actively sought to preserve and enhance the environment" and therefore "they have alleged a personal stake in the outcome of the controversy").

In short, the Administrative Procedure Act, the National Environmental Policy Act and numerous judicial decisions all support the standing of national environment organizations, like the Sierra Club, to bring suit to protect the environment. Such organizations have the concrete adverseness to satisfy the constitutional requirement of a "case" or "controversy" and do not violate any of the non-constitutional standing requirements which have been imposed by the courts. Consequently, these national conservation organizations have the right to bring litigation to ensure that federal officials and agencies are following statutory mandates in preventing further destruction of our environment.

2. *The Sierra Club Has Standing as a Local Organization Interested in Protecting Sequoia National Game Refuge, Forest, and Park*

We have contended above that the Sierra Club has standing as a national conservation organization to challenge the actions of federal officials despoiling the environment in Sequoia National Game Refuge, Forest, and Park. Even if we are wrong in this contention, the Sierra Club has standing as a local organization long interested in protecting this particular area.

There can be no doubt that local conservation organizations have standing to protect the environment in their areas.

The court below itself stated that "local conservationist organizations made up of local residents and users of the area, affected by the administrative action" have standing (R. 224). The court, however, found that "no such . . . organizations with a direct and obvious interest have joined as plaintiffs in this action" (R. 224).[23]

Several other decisions have also held that local conservation organizations have standing. In *Washington Department of Game v. Federal Power Commission*, 207 F.2d 391, 395, note 11 (1953), certiorari denied, 347 U.S. 936, the Ninth Circuit held that the Washington State Sportsmen's Council had standing as a party aggrieved since it claimed that the dams "will destroy fish in which they . . . are interested in protecting." More recently, *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, C.A. 4, decided April 6, 1971, held that since the Conservancy has a "special interest" in protecting a wilderness area from destruction, it had standing to sue to protect it. In *Pennsylvania Environmental Council, Inc. v. Bartlett*, 315 F. Supp. 238, 245 (M.D. Pa., 1970), the court held that the Council was aggrieved under the Administrative Procedure Act because one of its "principal purposes . . . is to protect and conserve the material resources, aesthetic qualities and recreational value of areas" like the valley and park involved in that case. And in *Crowther v. Seaborg*, 312 F. Supp. 1205, 1216 (D. Colo. 1970) the court upheld, in a case involving detonation of an atomic bomb, that the Colorado Open Space Coordinating Council "is adversely affected and aggrieved" and therefore has standing to assert "the interests of all these persons entitled to the full benefit, use and enjoyment of the natural resources of the State of Colorado . . . ." Accord, *Scenic Hudson Preservation Conference v. Federal Power Commission, supra*, 354 F.2d at 616; *Road Review League*

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[23] In a subsequent case, however, the Court of Appeals for the Ninth Circuit has held that even a local conservation organization lacks standing to sue to protect the environment. *Alameda Conservation Ass'n v. California, supra*, 437 F.2d at 1087.

v. Boyd, 270 F. Supp. 650, 661 (S.D. N.Y., 1967); *Delaware v. Penn Central*, D. Del., decided February 24, 1971 (2 Environment Reporter 1355, 1358-1359). In addition, the decisions cited above (pp. 50-54) upholding the standing of national conservation organizations apply *a fortiori* to local organizations.

The determination of the court below that the Sierra Club is not a local conservation organization with local residents and users of the area is clearly contrary to the facts. While it has since become a national organization, the Sierra Club started as an organization devoted to exploring and protecting the Sierra Nevada Mountains. Its articles of incorporation state that this is its principle interest. *Sierra Club Handbook* 60 (1969). As we have described above (pp. 23-29), John Muir, the founder of the Sierra Club, was intimately involved in exploring the magnificence of the Sierra Nevada Mountains and the Sierra Club led the fight for the protection of the entire Sequoia area. In large part because of its efforts, Sequoia National Park was created and Mineral King was made part of the Sequoia National Game Refuge. Thus, the Sierra Club has been working to protect this specific area since its founding almost 80 years ago.

Even today, the Sierra Club still has its headquarters in San Francisco and 27,000 of its 78,000 members reside in the San Francisco area (R. 4). It runs a camping trip yearly into Mineral King (*Sierra Club Handbook* 24 (1969)) and continues to have a particular interest in protecting this area as is evidenced by this litigation.

In short, whatever other national interests the Sierra Club might have, it is still, in considerable part, a local organization interested in protecting the Sierra Nevada Mountains in general and Sequoia National Game Refuge and Park in particular. There can be no doubt that it has the concrete adverseness to have standing in this litigation and to present the issues vigorously in the courts.

All these facts are either clear from the record or are part of the indisputable history of California. However, if there is any doubt concerning them, this Court should remand the case to the district court to allow the presentation of evidence concerning the Sierra Club's long involvement and concern for the protection of the very area involved in this litigation.[24]

3. *The Sierra Club Has Standing as an Organization Representing the Interests of Its Members in Protecting Lands Held in Trust for the American People in National Game Refuges, Forests and Parks*

a. Lands Held In Public Trust

The concept of land held in public trust has long been recognized by the courts. Government land not held for sale must be managed in a manner which is consistent with the purposes for which it is held. This general principle is affirmed in *Illinois Central v. Illinois,* 146 U.S. 387, 452 (1892), in which this Court stated that the title under which Illinois held land under the navigable waters of Lake Michigan is "different in character from that which the state holds in lands intended for sale. . . . It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction of interferences of private parties." The Court went on to invalidate the transfer of the submerged land from the state to a private corporation, on the ground that the transfer violated the state's public trust.

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[24]This contention, in this day of notice pleading, seems fairly included within the standing allegations. The complaint alleges that 27,000 of 78,000 members of the Sierra Club live in the San Francisco Bay area and that a principal purpose of the Club is to protect the Sierra Nevada Mountains (R. 4).

The courts have applied this concept specifically to national park and forest land. In *Allen v. Hickel,* 424 F.2d 944, 947 (1970), the Court of Appeals for the District of Columbia Circuit considered a challenge to the use of the Ellipse, which is national parkland, behind the White House. In upholding the standing of five individual citizens, the court stated that "citizens may sue to enjoin a government holding land in trust as a park from impermissibly diverting the use as to destroy their beneficial interest as park users." The court did not insist that they be actual users; it was enough that they "were entitled, as members of the public, to enjoy the park land . . . ."

Similarly, in *Archbold v. McLaughlin,* 181 F. Supp. 175, 180 (D. D.C., 1960), the district court upheld the standing of individuals to challenge the construction of a highway through a park:

> Land dedicated to the use of the public for park purposes is held in trust for that use, and a resident of the city or town in which the park is located may maintain a suit in equity to prevent diversion of the use of such land, since "courts of equity always interfere at the suit of a cestui que trust or a cestui que use to prohibit a violation of the trust, or a destruction of the right of user."

Where, as in this case, the park is not a local one and the trust is for the benefit of all American citizens, it would appear that any citizen can bring suit to require the federal agencies to protect the game refuge, forest and park from uses inconsistent with the purpose for which this land was reserved.

These principles have also been specifically applied to national forests. In *Utah Power & Light Co. v. United States,* 243 U.S. 389 (1917), a power company claimed the right to maintain a series of dams, reservoirs, pipe lines, power houses, transmission lines and subsidiary structures which it had installed in a United States forest reservation with the knowledge of officers and employees in the forestry

service, but without the statutory authorization of Congress. This Court held that, in suits by the United States to evict the power company and restore the forest to its proper use, the United States was not estopped by its officers' unauthorized consent. The court explained that "[a] suit [in equity] by the United States to enforce and maintain its policy respecting lands which it holds in trust for all the people stands upon a different plane . . . from the ordinary private suit. . . ." *Id.* at 409. Accord, *Light v. United States,* 220 U.S. 523, 537 (1911); see also *United States v. Trinidad Coal Co.,* 137 U.S. 160, 170 (1890); *Causey v. United States,* 240 U.S. 399 (1916); Sax, The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention, 68 *Mich. L. Rev.* 471, 492-496 (1970).

The purpose of the national parks is "to conserve the scenery and the national historic objects and the wild life therein . . . ." 16 U.S.C. 1. The purpose of Sequoia National Park is specifically to protect the trees, scenic beauty, and other aspects of the park in its natural condition (16 U.S.C. 43, 45b, 61) and to serve as a "public park, or pleasure ground, for the benefit and enjoyment of the people" (16 U.S.C. 41). The Sequoia Game Refuge was designed to protect the land and animals, and national forests are intended to protect the forests. 16 U.S.C. 688, 551. Consequently, these lands are held in trust for all Americans without regard to whether they are intended for use.

When a trustee does not defend the title to trust property, the beneficiary is entitled to bring suit to protect his interests. *Restatement of Trust,* Sec. 282. "It is well settled that a fiduciary who refuses to bring suit against a third party for the benefit of his cestui abuses his trust. In such event the cestui may maintain a bill in equity against the trustee in which the third party may be joined as a defendant." *Manning v. Miller Music Corp.,* 174 F. Supp. 192, 196 (S.D. N.Y., 1959). The members of the Sierra Club like all American citizens therefore have the right to sue to prevent despoilment of lands held in trust for them.

b. Representation of Members

This Court has frequently held that an organization has standing to represent its members when the latter have standing. In *National Motor Freight Traffic Association v. United States*, 372 U.S. 246, 247 (1963), this Court upheld the standing of associations of motor carriers as "proper representatives of the interests of their members." Accord, *E.g., N.A.A.C.P. v. Alabama ex rel. Patterson*, 352 U.S. 449, 458-459 (1958); *Bates v. Little Rock*, 361 U.S. 516, 523, note 9 (1959); *Louisiana ex rel. Gremillion v. N.A.A.C.P.*, 366 U.S. 293, 296 (1960); *N.A.A.C.P. v. Button*, 371 U.S. 415, 428 (1963). See also *National Association of Securities Dealers, Inc. v. Securities and Exchange Commission*, No. 59, this Term, decided April 15, 1971.

In *National Automatic Laundry and Cleaning Council v. Schultz*, decided March 31, 1971, the Court of Appeals for the District of Columbia noted the "line of cases that show a wide disposition to allow associations to appear as representatives of their members and to grant them standing to seek to vindicate the interest of those members." Accord, *Associated Industries v. Ickes, supra*, 134 F.2d at 712-713; *Archbold v. McLaughlin, supra*, 181 F.Supp. at 180; *National Coal Ass'n v. Federal Power Commission*, 191 F.2d 462 (C.A.D.C., 1951); *McArthur Liquors, Inc. v. Palisades Citizens Ass'n*, 265 F.2d 372, 374 (C.A.D.C., 1959); *Citizens Ass'n of Georgetown v. Simonson*, 403 F.2d 175, 176 (C.A.D.C., 1968); *United Federation of Postal Clerks v. Watson*, 409 F.2d 462, 469-470 (C.A.D.C. 1969), certiorari denied, 396 U.S. 902; *National Student Ass'n v. Hershey*, 412 F.2d 1103, 1120-1121 (C.A. D.C., 1969); *South Hill Neighborhood Ass'n v. Romney*, 421 F.2d 454 (C.A. 6, 1969) (holding of district court adopted by court of appeals); *Powelton Civic Home Owners' Ass'n v. Department of Housing and Urban Development, supra*, 284 F. Supp. at 828; *National Ass'n of Letter Carriers v. Blount*, 305 F. Supp. 546, 548 (D. D.C., 1969), appeal dismissed, No. 101, this Term. As the court of appeals held in *Citizens Ass'n of Georgetown v. Simonson, supra*, 403

F.2d at 176, "since the association is an authorized spokesman organized to promote those interests for its members, it too has standing to sue in order to protect their interests." And in *National Ass'n of Letter Carriers v. Blount, supra,* 305 F. Supp. at 548, the court upheld the standing of an organization since it "is the authorized spokesman of its membership" and "has sufficient interest in this litigation to pursue the matter vigorously and is in a position to bring the issues into sharp focus."

This principle that organizations can represent their members has been specifically applied to conservation groups. *Crowther v. Seaborg, supra,* 312 F. Supp. at 1205 (D. Colo.); *Sierra Club v. Hardin, supra,* D. Alaska, decided March 30, 1971 (2 Environment Reporter 1385); *White Lake Ass'n v. Whitehall,* Michigan Court of Appeals, decided February 27, 1970) (1 Environment Reporter 1383, 1386). Indeed, the court below upheld the right of conservation organizations to represent their members by finding that "local conservationist organizations made up of local residents and users of the area affected" could bring suit (R. 224).

Thus, individual American citizens have the right to sue to protect lands held in trust for them and organizations have standing to represent the rights of their members. The district court found, in upholding the allegations in the standing paragraph of the complaint, that the Sierra Club has been "regularly serving as a responsible representative" of persons interested in conservation and protecting the national game refuges, forests and parks of the country (R. 4, 197). Similarly, the First Annual Report of the Council on Environmental Quality which President Nixon sent to the Congress in 1970 states that the Sierra Club and other environment organizations "exist to inform, guide or represent their members in a wide variety of environmental and conservation matters" (p. 215). The Club therefore had standing to represent the interest of its members in protecting their rights in these invaluable lands held in trust for them.

4. *The Sierra Club Has Standing as an Organization Which Itself Uses Sequoia National Game Refuge, Forest, and Park and Represents the Interests of its Members Who Are Users of This Area*

Users of government lands clearly are injured and aggrieved when officials propose to use these lands for other purposes and therefore have standing (R. 224). Numerous other decisions have similarly upheld the standing of users. *Alameda Conservation Ass'n v. California, supra,* 437 F.2d at 1087, 1091-1092; *Parker v. United States,* 307 F. Supp. 685, 687 (D. Colo., 1969); *Crowther v. Seaborg, supra,* 312 F. Supp. at 1205; *Pennsylvania Environmental Council, Inc. v. Bartlett, supra,* 315 F. Supp. at 245; *EDF v. Corps of Engineers, supra,* D. D.C., decided January 27, 1971 (2 Environment Reporter 1173, 1174); *Sierra Club v. Hardin,* D. Alaska, decided March 30, 1971 (2 Environment Reporter 1385, 1392) ("Sierra Club and the Sitka Conservation Society have standing to assert the aesthetic conservational and recreational interests of local members and users who are directly affected").

The Sierra Club is itself a user of Sequoia National Game Refuge and Park. The Club runs and has run, virtually without interruption for over 60 years, camping trips into this area.[25] The Court of Appeals for the Ninth Circuit has expressly recognized in *Alameda Conservation Association v. California, supra,* 437 F.2d at 1091, that if a conservation organization has "a recreational operation which it conducted and which the defendants interferred with, it could assert it . . . ." The Sierra Club therefore has standing.

There can also be little doubt that the Sierra Club has among its members many users of the Sequoia National Game Refuge and Park. We have seen above (pp. 60-61) that

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[25] Testimony of H. M. Albright before the House Committee on Public Lands, February 26, 1920, on H.R. 5006, 66th Cong., 2d Sess. 69; 12 *Sierra Club Bulletin* 408 (1926); Sierra Club Handbook 24 (1969).

organizations have standing to represent the interests of their members if these members themselves have standing.

We do not believe that these simple facts are disputable. But if the government does dispute them or if it contends that these contentions are not encompassed within the standing allegations of the complaint (see R. 4), then the proper procedure is for this Court to remand the cause to the district court to allow the plaintiff to present evidence and to amend the complaint. For the plaintiff is clearly entitled to an opportunity to amend and to an evidentiary hearing before the action is dismissed.

5. *If This Court Finds that the Arguments Supporting Standing Are Insufficient, It Should Remand the Case to the District Court To Give the Plaintiff an Opportunity To Amend the Complaint and Present Evidence*

We have presented four alternative arguments supporting the standing of the plaintiff, the Sierra Club. The first contention—that the Sierra Club has standing as a national organization dedicated to preserving the environment—and the third contention—that the Sierra Club has standing as the representative of its members who, as American citizens, have the right to protect lands held in trust for them—plainly come within the allegations of the complaint (R. 4), and the district court's finding upholding these allegations (R. 197). The second contention—that the Sierra Club has standing as a local conservation organization with a special interest in the Sierra Nevada Mountains and particularly Mineral King and Sequoia National Park—is at the least, easily inferible from the complaint and findings. It is also supported by the legislative history of the statutes creating the National Game Refuge and Park (see pp. 23-29 above). The fourth contention—that the Sierra Club has standing as the representative of its members who use the area—is not supported by evidence of record.

Rule 8(f) of the Federal Rules of Civil Procedure provides that "all pleadings shall be so construed to do justice." Consequently, pleadings should be read liberally to attempt to sustain them. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506 (1959); *Ballou v. General Electric, Inc.*, 393 F.2d 398, 399 (C.A. 1, 1968). As this Court stated in *Conley v. Gibson*, 355 U.S. 41, 47-48 (1957):

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" [Rule 8(a)] that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests . . . . Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other factual procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," we have no doubt that petitioner's complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one miss by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

In *Surawitz v. Hilton Hotels Corp.*, 383 U.S. 363, 374 (1966), this Court stated:

> The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they be on occasion. These rules are designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in Court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should

> as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.

Read in this liberal spirit, the complaint would seem to encompass all the contentions we have raised.

Similarly, it is appropriate to recognize facts—which we believe the government will not dispute—concerning the character of the Sierra Club, its activities and members since this information is part of the legislative history of federal statutes, is otherwise a matter of public record, or is well known and undisputed. The record, like the complaint, should not be read narrowly at this early stage of the proceedings when there has not yet even been opportunity for an evidentiary hearing.

If the Court upholds standing, as we strongly urge, because the Sierra Club is a national conservation organization interested in protecting the environment, it need not go on to any of our other arguments. However, if standing is not found on the basis of that contention or of any other of the contentions which the Court finds are supported by the complaint and evidence in their present state, the cause should be remanded to the district court to allow the complaint to be amended and evidence to be presented on the other contentions.

Rule 15(a) of the Federal Rules of Civil Procedure plainly states that leave to amend "shall be freely given when justice so requires." Interpreting this rule, this Court stated in *Foman v. Davis*, 371 U.S. 178, 182 (1962):

> If the underlying facts and circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of the amendment, etc.—the leave should, as the rules require, be "freely given."

Accord, *e.g.*, *Maty v. Grassel Chemical Co.*, 303 U.S. 197, 200-201 (1938); *United States v. Hougham*, 364 U.S. 310, 317 (1960); *Nagler v. Admiral Corporation*, 248 F.2d 319, 322 (C.A. 2, 1957); *Middle Atlantic Utilities Co. v. S.M.W. Development Corp.*, 392 F.2d 380, 384 (C.A. 2, 1968); *Farkas v. Texas Instruments, Inc.*, 429 F.2d 849, 851 (C.A. 1, 1970).

This rule specifically applies when jurisdiction has been found to be lacking. 28 U.S.C. 1653 provides that "defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts" and the courts have held that this section should be liberally construed. *E.g.*, *Martin v. Ethyl Corp.*, 341 F.2d 1, 4 (C.A. 5, 1965); *John Birch Society v. NBC*, 377 F.2d 194, 198-199 (C.A. 2, 1967); *Cox v. Livingston*, 407 F.2d 392, 393 (C.A. 2, 1969). See also *Stern v. Beer*, 200 F.2d 794, 795 (C.A. 6, 1952); *Lemmon v. Cedar Point, Inc.*, 406 F.2d 94, 95, note 2 (C.A. 6, 1969); *Eklund v. Mora*, 410 F.2d 731, 732 (C.A. 5, 1969) (amendment after judgment). Similarly, plaintiff should have the opportunity to present evidence establishing its standing at a hearing on remand rather than have the factual issues determined on the basis of affidavits or documents alone.[26]

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[26] If the Court rejects all of the contentions we have made supporting the standing of the Sierra Club, we submit the cause should still be remanded to the district court to allow the joinder of additional plaintiffs with standing. As the court of appeals recognized (R. 224) and we have shown above (p. 62), users of the area plainly have standing. Just as plaintiffs can properly correct jurisdictional problems by amending the complaint, they can also correct any jurisdictional difficulty by joining a new plaintiff. *Hockner v. Guaranty Trust Co.*, 117 F.2d 95, 98 (C.A. 2, 1941). *Cf. Finn v. American Fire & Casualty Co.*, 207 F.2d 113 (C.A. 5, 1953) (jurisdiction perfected by dismissing two defendants after trial).

Any other course will simply produce more delay and burden both the parties and the courts. Other plaintiffs with proper standing are entitled to bring separate suit. The most fair and expeditious procedure for all the parties is to allow them to enter the present case which is already in process.

II

THE COURT OF APPEALS ERRED IN REVERSING THE GRANT OF A PRELIMINARY INJUNCTION BY THE DISTRICT COURT

The district court, on the basis of affidavits and supporting documents without an evidentiary hearing, issued a preliminary injunction against granting any permits for construction of the resort or highway (R. 220-201). The court reasoned that, without the injunction, defendants might "substantially chang[e] the existing situation.... [W]e find that plaintiff has raised questions, concerning possible excess of statutory authority, sufficiently substantial and serious to justify a preliminary injunction against both Agriculture and Interior pending trial of these issues on the merits or the further order of this court" (R. 198-199).

The court of appeals reversed (R. 208-235). It stated that in order to obtain a preliminary injunction, "the plaintiff must establish a strong likelihood or 'reasonable certainty' that he will prevail on the merits at a final hearing" (R. 224). The court then reviewed the merits of each claim and found "little or no likelihood of success in opposing the proposed development upon the ground that there would be an illegal use of term and revocable permits" (R. 230); that "[w]e cannot find in the [plaintiff's] contentions concerning this proposed road any degree of substantiality" (R. 231); "we accept the argument of the Secretary as convincing" concerning the electrical transmission line (R. 232); and "[w]e find no substance in this argument" relating to the project interfering with the Sequoia National Game Refuge (R. 234).[27] The Court concluded that plaintiff "has not shown with any degree of certainty that it will or can succeed. Neither has it shown that it, or its members or anyone else will suffer irreparable injury" (R. 234).

[27]The court of appeals similarly found that the issue of public hearings concerning the road through Sequoia National Park, an issue which we do not discuss, "cannot be considered a substantial factor in this proceeding" (R. 233).

This Court has held (*Frendergast v. New York Telephone Co.*, 262 U.S. 43, 50-51 (1923)):

> It is well settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court; and that, upon appeal, an order granting such an injunction will not be disturbed unless contrary to some rule of equity, or the result of improvident exercise of judicial discretion.

Accord, *Alabama v. United States*, 279 U.S. 229, 231 (1929); *Mitchell v. Penny Stores, Inc.*, 284 U.S. 576 (1931); *United States v. Corrick*, 298 U.S. 435, 437-438 (1936); *Deckert v. Independence Shores Corp.*, 311 U.S. 282, 290 (1940); *Yakus v. United States*, 321 U.S. 414, 440 (1944). See 7 Moore, *Federal Practice* (2d ed., 1968), 1625, 1630-1631. Similarly, in *Chicago v. Fox Film Corp.*, 251 Fed. 883, 884 (C.A. 7, 1918), the court of appeals stated:

> A pendite lite injunctional order will not be reversed unless there was an abuse of discretion; and this can only appear from an obvious misunderstanding of the facts or a palpable misapplication of well-settled rules of law on the part of the trial judge.

As a result, there are "severe limitations" upon the scope of review of the courts of appeals. *Mytinger & Casselberry, Inc. v. Numanna Laboratories Corp.*, 215 F.2d 382, 384 (C.A. 7, 1954).

The broad discretion of the district court and the narrow review by the appellate courts reflect the nature of a preliminary injunction. A "preliminary injunction . . . is . . . interlocutory, tentative, provisional, and interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness." *Hamilton Watch Co. v. Benrus*, 206 F.2d 739, 742 (C.A. 2, 1953). The trial court is not supposed to determine the merits but instead merely to keep the status quo pending determination of the case. See pp. 76-78 below. The determination is usually based, as it was here, on affidavits without a full evidentiary hearing. It is assumed that, if there is no appeal, the merits will be tried promptly and a final determination made.

We submit that the district court properly exercised its discretion in this case. As we will show below, the district court's determination to issue an injunction is fully consistent with equitable principles. Plaintiff has raised serious legal and factual questions concerning the construction of a ski and summer resort in Sequoia National Game Refuge and Forest and of a highway and electrical transmission line in Sequoia National Park. If an injunction had not been issued, construction would have begun and the harm to the refuge, forest, and park would have been irreparable. In these circumstances, the district court properly exercised its discretion to prevent construction and to preserve the status quo.

A. The District Court Properly Issued The Preliminary Injunction To Preserve The Status Quo On The Basis Of Finding That Plaintiff Raised Substantial And Serious Issues

The district court issued the preliminary injunction in order to preserve the status quo because "[p]laintiff has raised questions, concerning possible excess of statutory authority, sufficiently substantial and serious to justify a preliminary injunction . . . ." (R. 199). The court of appeals reversed on the ground that a preliminary injunction requires the plaintiff to "establish a strong likelihood or 'reasonable certainty' that he will prevail on the merits at a final hearing" (R. 224). We submit that the district court and not the court of appeals applied the appropriate standard.

While this Court once stated that "[t]he right [to a preliminary injunction] must be clear" (*Truly v. Wanzer*, 46 U.S. (5 How.) 141, 142 (1847)), this Court has since refused to follow this rule. The Court has squarely held (*Ohio Oil Co. v. Conway*, 279 U.S. 813, 815 (1929)):

> Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable, if the application be denied and the final

> decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction will usually be granted.

Accord, *Alabama v. United States, supra,* 279 U.S. at 231. Similarly, in *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 316 (1940), the Court held that, instead of deciding the merits, the district court should have decided only "whether the showing made raised serious questions" and whether failure to issue an injunction would result in irreparable injury.

Although the decisions of the courts of appeals are divided, most cases have held that the plaintiff need only raise a serious or substantial or grave question, at least if he shows that the injury to him will be irreparable if a preliminary injunction were not to issue. For example, in *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (1953), the Second Circuit held that if the plaintiff has shown irreparable injury, he need only raise "questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." The decisions of the Third, Fifth and Eighth Circuits appear unanimously to support this rule.[28] The opinions of the Ninth Circuit, until the decision

[28]Third Circuit: *Railroad Yardmasters v. Pennsylvania R.R. Co.*, 224 F.2d 226, 229 (1955).

Seventh Circuit: *Selchow & Righter Co. v. Western Printing & Lithographing Co.*, 112 F.2d 430, 431 (1940) (must only show need to protect plaintiff from "great injury" without any "anticipated determination of issues"); *Mytinger & Casselberry, Inc. v. Numanna Laboratories Corp.*, 215 F.2d 382, 385 (1954).

Eighth Circuit: *City of Newton v. Levis,* 79 Fed. 715, 718 (1897); *Allison v. Carson,* 88 Fed. 581, 584 (1898); *Denver & R.G.R. Co. v. United States,* 124 Fed. 156, 161 (1903); *Love v. Atchinson, T. & S.F. Ry.*, 185 Fed. 321, 331-332 (1911); *Magruder v. Belle Fourche Valley Water User's Ass'n,* 219 Fed. 72, 82 (1914); *Council Bluffs v. Omaha & C.B. St. Ry. Co.*, 9 F.2d 246, 247 (1925); *Security Metal Products Co. v. Kawneer Co.*, 14 F.2d 569, 572-573 (1926); *Special School*

(continued)

below, also seem uniformly to support this rule and the court of appeals cited no Ninth Circuit decisions in support of its decision.[29] The decisions of the Fourth, Fifth, Sixth, Tenth, and District of Columbia Circuits are divided.[30] While two of the five decisions relied upon by the court of appeals below were from the Second Circuit, many of the earlier

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Dist. of Malvern v. Speer, 75 F.2d 420, 422 (1935); *Pratt v. Stout*, 85 F.2d 172, 176 (1936); *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 697 (1948); *Missouri-Kansas-Texas R. Co. v. Randolph*, 182 F.2d 996, 999 (1950); *Chicago, B. & Q. R. Co. v. Chicago Great Western R. Co.*, 190 F.2d 361, 363-364 (1951); *Des Moines v. Continental Illinois Nat. Bank & Trust Co.*, 205 F.2d 729, 732 (1953).

[29]Ninth Circuit: *Northwestern Stevedoring Co. v. Marshall*, 41 F.2d 28, 29 (1930) ("the possibility that the plaintiff may make out a case on the merits"); *Ross-Whitney Corp. v. Smith Kline & French Laboratories*, 207 F.2d 190, 194 (1953); *Burton v. Matanuska Valley Lines, Inc.*, 244 F.2d 647, 650 (1957).

[30]Fourth Circuit: for:*Buskirk v. King*, 72 Fed. 22, 25 (1896); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, decided April 6, 1971; against: *Sinclair Refining Co. v. Midland Oil Co.*, 55 F.2d 42, 45 (1932).

Fifth Circuit: for:*Massie v. Buck*, 128 Fed. 27, 31-32 (1904); *King Lumber Co. v. Benton*, 186 Fed. 458, 459 (1911); against: *Wooten v. Ohler*, 303 F.2d 759, 762 (consider, as one of several factors, probable ultimate outcome . . . or the likely ultimate holding).

Sixth Circuit: for: *American Federation of Musicians v. Stein*, 213 F.2d 679, 683 (1954), certiorari denied, 348 U.S. 873; against: *Crane Co. v. Briggs Mfg. Co.*, 280 F.2d 747, 749 (1960); *Garlock, Inc. v. United Seal, Inc.*, 404 F.2d 256, 257 (1968); citing both standards: *Blount v. Societe Anonyme du Filtre*, 53 Fed. 98, 101 (1892).

Tenth Circuit: for: *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 781-782 (1964); against: *Crowther v. Seaborg*, 415 F.2d 437, 439 (1969). District of Columbia: for: *National Lawyers Guild*

District of Columbia: for: *National Lawyers Guild v. Browneil*, 225 F.2d 552, 554 (1955), certiorari denied, 351 U.S. 927; against: *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489 (1968); *District 50, United Mine Workers v. International Union, United Mine Workers*, 412 F.2d 165, 167 (1969); *A Quaker Action Group v. Hickel*, 421 F.2d 1111, 1115 (1969).

and more recent decisions of that Circuit have followed the majority rule.[31]

The confusion in standards applied by the lower courts can largely be resolved. Several decisions have indicated that a showing of reasonable certainty is needed only where no irraparable injury exists. For example, *Unicon Manufacturing Corp. v. Koppers Co.*, 366 F.2d 19[illegible] 204-205 (1966), reconciled the two Second Circuit cases upon which the court of appeals relied with other Second Circuit decisions:

> We reaffirm our holding in H. E. Fletcher Co. v. Rock of Ages Corp., 326 F.2d 13, 17 (2 Cir. 1963), that the party seeking a preliminary injunction has a "burden of convincing [the court] 'with reasonable certainty' that it 'must succeed at final hearing.' Hall Signal Co. v. General Ry. Co., 153 F. 907, 908 (2 Cir. 1907)," where, as there, it appears that a "lack of adequate showing of irreparable damage" also exists. But we do not think that what was said in *Fletcher* is a departure from the more generally accepted statement of the rule that "it will ordinarily be enough that the plaintiff . . . has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." where, as here, "the balance of hardships" tips decidely toward the party requesting the temporary relief. Hamilton Watch Co. v. Benrus Watch Co., supra, 206 F.2d at 470.

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[31] Second Circuit: for: *Hadden v. Dooley*, 74 Fed. 429, 431 (1896); *Cone v. Rorick*, 112 F.2d 894, 896 (1940); *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740, 742 (1953); *Unicon Management Corp. v. Koppers Co.*, 366 F.2d 199, 204-205 (1966); *Dino de Laurentiis Cinematografica v. D-150, Inc.*, 366 F.2d 373, 375 (1966); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205-1206 (1970); against: *Hall Signal Co.*, 153 Fed 907, 908 (1907); *Speeding Products v. DriMark Products, Inc.*, 271 F.2d 646, 648, (1959); *Societe Comptoir de L'Industrie Contonniere Establishments Boussac v. Alexander's Department Stores, Inc.*, 299 F.2d 33, 35 (1962); *H.E. Fletcher Co. v. Rock of Ages Corp.*, 326 F.2d 13, 17 (1963).

Accord, *Dino DeLaurentiis Cinematografica v. D-150, Inc.* 366 F.2d 373, 375 (C.A. 2, 1966). Two other courts have similarly explained that the requirements of "reasonable probability of success" and "a probable right" require, if irreparable injury is involved, only that "substantial issues" are raised and the plaintiff "is not embarked on frivolous litigation." *Continental Oil Co. v. Frontier Refining Co.*, 338 F.2d 780, 781-782 (C.A. 10, 1964); *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, C.A. 4, decided April 6, 1971.

Another group of decisions makes essentially the same point in different words. These cases hold (*Perry v. Perry*, 190 F.2d 601, 602 (C.A.D.C., 1951)):

> When a motion for a preliminary injunction is presented to a court in advance of hearing on the merits, it is called upon to exercise its discretion "upon the basis of a series of estimates: the relative importance of the rights asserted and the rights sought to be enjoined, the irreparable nature of the injury allegedly flowing from denial of preliminary relief, the probability of the ultimate success or failure of the suit, the balancing of damage and convenience generally."

Accord, *Doeskin Products, Inc. v. United Paper Co.*, 195 F.2d 356, 358-359 (C.A. 7, 1952); *Industrial Bank of Washington v. Tobriner*, 405 F.2d 1321, 1324 (C.A. D.C., 1968). See also 3 Barron & Holtzoff (1958), pp. 492-493; Note, "Developments in the Law: Injunctions," 78 *Harv. L.Rev.* 994, 1056 (1965). These cases imply that a plaintiff, if he demonstrates irreparable injury to himself and not to the defendant, need only raise serious issues concerning important rights in order to obtain a preliminary injunction. They are thus consistent with the numerous other decisions cited above which state that a preliminary injunction can properly issue upon the showing of irreparable injury and the raising of serious issues.

The rule as determined by this Court and the overwhelming majority of decisions of the courts of appeals is firmly based on American and English history. In *Georgia v. Brails-*

ford, 2 U.S. (2 Dall.) 402 (1792), this Court reviewed a preliminary injunction issued by a circuit court against payment of funds pending determination to whom the money belonged. Mr. Justice Johnson would have reversed on the ground that "the bill should set forth a case of probable right. . . ." *Id.* at 405. Mr. Justice Blair, on the other hand, stated that (*id.* at 407):

> It appears to me to be too early, likewise, to pronounce an opinion upon the titles in collision, since it is enough, on a motion of this kind, to show a colorable title. The state of Georgia has set up her confiscation act, which certainly is a fair foundation for future judicial investigation; and that an injury may not be done, which it may be out of our power to repair, the injunction ought, I think, to issue, till we are enabled by a full inquiry to decide upon the merits of the whole case.

The preliminary injunction was upheld.

The English courts similarly uphold preliminary injunctions if a substantial issue is raised. In *Glascott v. Lang,* 3 My. & Cr. 451, 455 (1838), the Lord Chancellor stated:

> [F]or the purpose of an injunction, it is not necessary that the Court should find a case which would entitle the Plaintiff to relief at all events. It is quite sufficient if the Court finds . . . a case which makes the transaction a proper subject of investigation in a Court of Equity. . . .

The Lord Chancellor stated in *Great Western Ry. v. Birmingham and Oxford Junction Ry. Co.,* 2 Ph. Ch. 597, 602-603 (1848):

> It is certain that the Court will in many cases interfere and preserve property in *status quo* during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights. . . . It is true that the Court will not so interfere, if it thinks that there is no real question between the parties but seeing that there is a substantial question to be decided, it will preserve the

> property until such question can be regularly disposed of.

Accord, *Shrewsbury v. Shrewsbury and Birmingham Rly*, 1 Sim. (N.S.) 410, 426-427 (1851) (the court "must satisfy itself, not that the Plaintiff has certainly a right, but that he has a fair question to raise as to the existence of such a right").

This rule is also consistent with the purpose of the preliminary injunction. They are intended, as shown below (pp. 76-78), to preserve the status quo. Without the need for a showing of probable right or reasonable certainty of success, the determination whether to issue a preliminary injunction and thereby preserve the status quo can be made promptly. Protracted evidentiary hearings are less necessary and affidavits, document, and supporting memoranda of law will generally be sufficient.

This and other federal courts have held that a strong showing must be made before an order of an administrative agency can be stayed or enjoined. *Public Service Commission v. Wisconsin Telephone Co.*, 289 U.S. 67, 70-71 (1933); *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (C.A. D.C., 1958); *Eastern Airlines, Inc v. Civil Aeronautics Board*, 261 F.2d 830 (C.A. 2, 1958). However, these cases involve decisions made by administrative agencies after quasi-judicial proceedings at which the parties could be heard. Here, plaintiff was denied any kind of hearing (R. 48, 26) and the proceeding in the district court was the first in which plaintiff had the opportunity to challenge the legality of defendants' actions. In such situations, the courts have not distinguished between suits challenging actions of federal officials and actions of private persons and have generally held that only a serious or substantial question need be raised. *E.g., National Lawyers Guild v. Brownell*, 225 F.2d 552, 554 (C.A.D.C. 1955), certiorari denied, 351 U.S. 927 (Attorney General); *West Virginia Highland Conservancy v. Island Creek Coal Co.*, C.A. 4, decided April 6, 1971 (Forest Supervisor).

Applying these standards to this case, the district court's determination to issue an injunction was clearly correct. As we will see below, plaintiff was seriously threatened with irreparable injury. And whatever view may ultimately be taken of the merits, there can be no doubt that the questions plaintiff raises are important, substantial, and difficult.

B. The District Court Properly Found That Plaintiff Would Suffer Irreparable Injury If A Preliminary Injunction Were Not Issued

The district court found that, if the preliminary injunction were not issued, plaintiff would suffer "imminent and irreparable injury" because otherwise the defendants would be able to grant permits allowing the construction of the ski and summer resorts in Sequoia National Game Refuge and of the highway through Sequoia National Park (R. 198). The court of appeals concluded, without explanation, that there would be no irreparable injury (R. 234).

The principal function of a preliminary injunction is to preserve the status quo until the case can be fully investigated and determined. *E.g., Hamilton Watch Co. v. Benrus Watch Co., supra,* 206 F.2d at 742; *American Federation of Musicians v. Stein,* 213 F.2d 679, 683 (C.A. 6, 1954), certiorari denied, 348 U.S. 873; *Unicon Management Corp. v. Koppers Co., supra,* 366 F.2d at 204; 7 Moore, *Federal Practice* (2d ed., 1968), p. 1624. The preliminary injunction serves to ensure that, if the plaintiff ultimately prevails, he can obtain the relief to which he is entitled. As the court of appeals stated in *City of Newton v. Levis,* 79 Fed. 715, 717 (C.A. 8, 1897), if the court

> refused to issue the injunction, the property and business of the electric company . . . would be immediately destroyed. Its final decree, if it should be in his favor, would be utterly nugatory . . . . In other words, to grant the injunction was to preserve the property of all parties in status quo, and prevent

> substantial damage to anyone, whatever the final decree might be, while to refuse it was to permit the immediate destruction of the property of the electric company, . . . to allow the infliction of irreparable loss upon them, and to render the suit and its decision useless, if the final decree should be in favor of the appellee. There can be no question of the duty of the chancellor to issue an injunction under such circumstances.

Similarly, as the Court of Appeals for the Ninth Circuit itself stated in *Burton v. Matanuska Valley Lines, Inc.*, 244 F.2d 647, 650 (1957):

> Such [a preliminary] injunction preserves the status quo and protects plaintiffs from irreparable injury during the pendency of a suit until such time as the court may adjudge and finally determine the rights of the parties. Necessarily the court must presuppose that in the case at bar it *may* turn out that plaintiff will ultimately lose. . . . But this *possibility* does not compel a denial of a temporary injunction if proper showing be made therefor; otherwise a court, which necessarily requires time to reach a final determination, would have no way to protect a party who may suffer irreparable loss if the status quo be not preserved. Without this power to issue interlocutory injunctions, courts would be unable to make their final judgments effective, for the very right to be protected, or the subject of the action itself, might be destroyed irreparably during the period required to arrive at an ultimate determination of the action.

Accord, *e.g.*, *Benson Hotel Corp. v. Woods*, 168 F.2d 694, 696 (C.A. 8, 1948); *Flight Engineers International Ass'n v. American Airlines, Inc.*, 303 F.2d 5, 11-12 (C.A. 5, 1962); *Maas v. United States*, 352 F.2d 348, 352 (C.A. D.C. 1966). Thus the basic rule is that the court will issue a preliminary injunction to preserve the status quo, "the last uncontested status which preceded the pending controversy." *Westinghouse Electric Corp. v. Free Sewing Machine Co.*, 256 F.2d 806, 808 (C.A. 7, 1958). Accord, *Washington*

Capitols Basketball Club, Inc. v. Barry, 419 F.2d 472, 476 (C.A. 9, 1969).

This case involves the classic injury which the preliminary injunction is designed to protect against. In *Erhardt v. Boaro*, 113 U.S. 537, 539 (1885), this Court said that it—

> is now a common practice in cases where mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, of the removal of coal, to issue an injunction.... The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction pending legal proceedings....

Accord, *Buskirk v. King*, 72 Fed. 22, 25 (C.A. 4, 1896). Only a few months ago, the Court of Appeals for the Fourth Circuit held that the construction of a road through a wilderness area threatens irreparable injury. "[R]estoration of what the Wilderness Act of 1964 and other enactments seek to protect may not be achievable for several generations." *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, decided April 6, 1971. Similarly, here, the actions of defendants in Sequoia National Game Refuge, Forest, and Park threatened the destruction permanently or at least for generations of the wildlife, natural beauty, and other features which the refuge, forest, and park were designed to protect.

There can be no doubt that the harm to the Sierra Club is the harm to the environment. If plaintiff has standing, as we contend above (pp. 29-63), to challenge the actions of defendants because their actions will allow despoiling of the environment, it necessarily follows that they are hurt by any harm to the environment which may result. They need not show direct economic injury; as this Court has held, plaintiff's interest "may reflect 'aesthetic, conservational and recreational' as well as economic values." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 154 (1970).

It is proper of course to consider the harm to the defendants and their interests from issuing a preliminary injunction as well as to plaintiff and its interests if an injunction is not issued. "A court of equity must exercise its discretion in such manner as to safeguard the interests of both parties, and . . . it is an abuse of judicial discretion to issue an injunction which permits one party to obtain an advantage by acting while the hands of the adverse party are tied by the writ." *Corica v. Ragen*, 140 F.2d 496, 499 (C.A. 7, 1944). "[T]he award [of a preliminary injunction] is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. *Yakus v. United States*, 321 U.S. 414, 440 (1944). However, when the district court has balanced the interest of the parties, "[e]specially will the granting of the temporary writ be upheld when the balance of injury as between the parties favors its issue." *Prendergast v. New York Telephone Co., supra*, 262 U.S. at 51. Accord, *Security Metal Products Co. v. Kawneer Co.*, 14 F.2d 569, 572 (C.A. 7, 1926); *Pratt v. Stout, supra*, 85 F.2d at 172.

There can be little doubt that the balance of injury overwhelmingly favors the plaintiff. If the preliminary injunction had not been issued, the district court found that construction would have soon begun (R. 198). The harm to wildlife, natural beauty and other features of the national game refuge, forest, and park would have been severe. In contrast, the only harm to the defendants and the interests they represent is the delay from not being able to build the resort and highway immediately. And if they had not appealed the temporary injunction, the district court would probably have long ago made a final determination on the merits.

It is of course true that in weighing the injuries involved the courts must consider not only the direct interest of the parties but also the public interest. *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, C.A. 4, decided April

6, 1971; *Udall v. D.C. Transit System, Inc.*, 404 F.2d 1358, 1360 (C.A.D.C., 1968); 7 Moore, *Federal Practice, supra*, pp. 1628-1629. "Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginia Ry. Co v. System Federation,* 300 U.S. 515, 552 (1937); *Yakus v. United States, supra,* 321 U.S. at 441.

Here, however, the public interest is precisely the issue to be determined. Defendants claim that the construction of the ski and summer resort will further the public interest. Plaintiff claims that it is representing the public interest by defending a national game refuge, forest, and park from despoilment and by seeking to ensure that defendants do not violate federal statutes designed to protect these areas. In *West Virginia Highlands Conservancy v. Island Creek Coal Co.*, C.A. 4, decided April 6, 1971, where a conservation organization was suing to protect a wilderness area from destruction, the court of appeals stated that "the special interest of Conservancy aligns it with the public interest." Similarly, here, there is no basis for allowing defendants to proceed to destroy these unique national resources in the name of the public interest when the very legality of their action is under challenge.

The courts have made clear that the discretion of the trial court concerning preliminary injunctions, which we have discussed above (p. 68) is particularly broad when the preliminary injunction is only intended to serve the status quo. "The granting of a preliminary injunction to protect and preserve an existing state of things from a seriously detrimental change, pending the determination of important and doubtful issues arising in litigation is so commonplace and ordinarily so much a manner within the trial court's discretion as to preclude a reversal on appeal, except for a clear abuse of discretion." *Des Moines v. Continental Illinois Nat. Bank & Trust Co., supra,* 205 F.2d at 732. "[A]ppellants object to the injunction for the very reason that it

prevents them from changing the status quo during the pendency of this suit. It is well settled, and properly so, that appellate courts will not interfere with injunctions of this limited effect except in the unusual case and for very persuasive reasons." *American Ice Co. v. Royal Petroleum Corp.*, 261 F.2d 365, 368 (C.A. 3). It is plain that the district court weighed the injury to the respective parties in this case and properly concluded that the irreparable injury threatened to the refuge, forest, and park justified issuing the preliminary injunction pending final determination.

III

THE CONSTRUCTION OF A SKI AND SUMMER RESORT IN THE SEQUOIA NATIONAL GAME REFUGE AND FOREST AND A HIGHWAY AND ELECTRIC TRANSMISSION LINE THROUGH SEQUOIA NATIONAL PARK VIOLATES FEDERAL STATUTES

The court of appeals in effect decided the merits in determining that there was no reasonable likelihood that plaintiff would prevail. The law is clear that statements and rulings of an appellate court on the merits in reviewing a preliminary injunction are not binding on the district court upon remand and that the district court, after an evidentiary hearing and careful deliberation, is free to make its own judgment. "[T]he decision of either the trial or appellate court in granting or denying the temporary injunction does not constitute the law of the case and will not estop the parties nor the court as to the law of the case." *Benson Hotel Corp. v. Woods, supra,* 168 F.2d at 693. Accord, *Council Bluffs v. Omaha & C. B. St. Ry. Co.*, 9 F.2d 246, 249 (C.A. 9, 1925); *Meiselman v. Paramount Film Distributing Corp.*, 180 F.2d 94, 97 (C.A. 4, 1950); 7 Moore, *Federal Practice, supra,* p. 1703. Consequently, it is arguable that this court need only reverse the determination below as to standing and to the preliminary injunction and remand the case to the district court for determination of the merits.

We submit, however, that this Court should consider the merits of this case. The court of appeals indicated its views so clearly on the merits that the district court is likely to be precluded from making an independent judgment. It is therefore almost certain that the rulings of the court of appeals concerning the relevant law will prevail either in the district court or in the court of appeals on a second appeal. Since this Court has granted the writ of certiorari on the merits as well as on standing, it would seem appropriate to consider these important legal issues at this time. Postponement of these merits until a likely new petition for a writ of certiorari by the plaintiff will only delay the conclusion of this litigation even further.

We therefore urge the Court to determine the major legal questions—those relating to the meaning of the relevant federal statutes. The district court and court of appeals have explored these legal, as contrasted to factual, questions and they are ripe for decision. These issues are intrinsically involved in the case and will not be avoidable on remand. If, as we believe, the court of appeals has erred, the district court and the parties should have the benefit of a proper interpretation of these statutes to guide the evidentiary hearing on remand.

Introduction

The starting point for analysis of the merits is the Constitution. Article IV, Section 3, clause 2 provides:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States. . . .

Numerous decisions of this Court and lower courts have interpreted this clause to give Congress exclusive jurisdiction over the disposition of land or other property of the United States and to give no such power to the head of an executive agency without legislation by Congress. *E.g.*, *United States v. Gratiot*, 39 U.S. (14 Pet.) 336 (1841); *Royal Indemnity*

Co. v. United States, 313 U.S. 289, 294 (1941); *United States v. Nicoll*, 27 Fed. Cas. No. 15879, pp. 149, 150 (C.C., N.Y., 1826) (Mr. Justice Thompson); *United States v. Utah Power and Light Co.*, 209 Fed. 554, 557 (C.A. 8, 1913), affirmed, 243 U.S. 399; *Udall v. Oil Shale Corp.*, 406 F.2d 759, 764 (C.A. 10, 1969). Ordinary law concerning the sale or lease of private land does not apply. Laches, estoppel, and other equitable doctrines do not bind the United States by the acts of its agents unless Congress has authorized the agents to act. *E.g., Hart v. United States*, 95 U.S. 316, 318 (1877); *Utah Power and Light Co. v. United States*, 243 U.S. 389, 409 (1917); *Wilber Nat. Bank v. United States*, 294 U.S. 120, 123-124 (1935).

These cases reflect the concern that the United States must not be bilked by private parties of the public lands which, as we have seen (pp. 57-59), are "held in trust for all the people." *United States v. Trinidad Coal Co.*, 137 U.S. 160, 170 (1890). Today, there is again rising concern, this time based on the need to protect the remaining natural beauty, wildlife, and other resources of this country, to protect the public lands from disposal or despoilment. This concern is reflected in numerous recent Acts relating to air pollution, water pollution, open space, and, most particularly, the National Environmental Policy Act. That Act, *inter alia*, places on the Federal Government the responsibility to "preserve important . . . natural aspects of our national heritage." 42 U.S.C. 4331(b)(4). We therefore urge this Court to reaffirm its numerous early decisions in the light of present federal policy and require that officials of the United States demonstrate clearly their authority to allow the use of the public lands, particularly when, as in this case, these lands are in national game refuges, forests, or parks.

A. The Secretary of Agriculture Has No Authority To Issue a Permit Which Will Convert Sequoia National Game Refuge into a Ski and Summer Resort

We submit that the Secretary of Agriculture has no authority to allow the construction of a major ski and summer resort occupying 13,000 of the 15,000 acres in Sequoia National Game Refuge.

Sequoia National Game Refuge was established in 1926 by 16 U.S.C. 688 which specifically stated its purpose:

> [I]t is the purpose of this section to protect from trespass the public lands of the United States and game animals which may be thereon . . . . [T]he land included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established.

Consequently, it is clear that the Secretary has authority to issue term permits under 16 U.S.C. 497 and revocable permits under 16 U.S.C. 551[32] only so far as the other uses will protect the wildlife in the refuge.

Mineral King is virtually surrounded by Sequoia National Park and is integrally related to the park. When Mineral King was solely within Sequoia National Forest, the Sierra Club did not regard this protection as sufficient. John Muir specifically complained about the lack of care taken of the area. *Atlantic Monthly*, January 1898, p. 27. On the other hand, the Forest Service opposed including the area in the park because of mineral claims there. See pp. 25, 28 above. Sequoia National Game Refuge was created as a compro-

[32]We argue below (pp. 89-110) that the Secretary has no authority to issue so-called revocable permits for a major resort even in national forests which are not game refuges.

mise between putting the area in Sequoia National Park, under the administration of the Park Service, or excluding the area and leaving its administration under the Forest Service.

In 1921 the Sierra Club suggested that "[s]hould the three southern townships [near Mineral King] be removed from the park, steps should be taken to protect the deer and other game, which for thirty years, since the creation of the park in 1890, have enjoyed a full measure of Government protection." The Sierra Club repeated this suggestion in 1923 when the Forest Service was opposing the inclusion of the three southern townships and Mineral King in the park. In May 1923 the Sierra Club stated, "We feel that the retention of these three townships within the park is a matter of great importance, by means of the fact that large numbers of deer and other game, which live in the higher regions of the park during the summertime, make these three townships their winter home."[33]

The Sierra Club itself suggested the compromise with regard to Mineral King that it be made a game refuge. 11 *Sierra Club Bulletin* 324; Strong, *Trees or Timber, supra,* p. 44; R. Rep. No. 902, 69th Cong., 1st Sess. 2. One of the reasons for this suggestion was to protect the game in the area. "At the time that the question of eliminating these three townships was discussed, . . . an answer to this objection that the game would be without protection in the winter time, it was suggested that a game refuge, either State or Federal, might be established."[34]

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[33]A recent study by the Park Service indicates this migration still occurs: "The oft-repeated observation that these parks are not self-sufficient ecological islands but are markedly susceptible to outside influences, is well illustrated by changes in the animal life. These changes are accentuated by the animals' mobility . . . [T]he ecological interrelationships and ultimate results of such animal movements across park boundaries have received scarcely any detailed study." *Sequoia and Kings Canyon National Parks Natural Sciences Research Plan,* edited by Lowell Sumner, Dept. of the Interior, April 1966, p. 21.

[34]National Parks Association Bulletin #34, July 6, 1923.

The Forest Service agreed to this compromise. In 1924 Chief Forester Greeley testified, "There is one feature of the bill (H.R. 4095) which the Forest Service has asked Mr. Barbour to include and that is the creation of a Federal game preserve to cover this peninsula."[35]

Two years later Mr. Greeley again testified in support of the game refuge in the hearings which led to 16 U.S.C. 688:[36]

> Mr. Chairman: Will the game refuge be subject to grazing?
>
> Mr. Greeley: I think not. There may be a little grazing in there, but practically none.
>
> Mr. Chairman: You will not permit grazing in there?
>
> Mr. Greeley: No, sir; grazing ought to be excluded from the game refuge area.
>
> Mr. Chairman: What is the particular reason for segregating this and setting it aside as a game refuge?
>
> Mr. Greeley: In the first place we felt that the Mineral King area should be kept out of the park, because there is a considerable section of mineralized territory there that has been prospected and mined in a small way for a good many years. Now leaving that out of the park, you can readily appreciate that with the park boundaries surrounding this little peninsula of natural forest land, all but the little neck, it would be extremely easy to have poaching on park lands if hunting were permitted on national forest lands. Aside from that there is a very valuable deer herd in this region partly in the national forest and partly in the present park, and we think as a matter of game conservation it is desirable to enlarge somewhat the area subject to

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[35]Hearings on H.R. 4095 before the House Committee on Agriculture, February 27-28, 1924, 68th Cong., 1st Sess. 23.

[36]Hearings on H.R. 9387 before the House Committee on Agriculture, April 7, 8 and 10, 1926, 69th Cong., 1st Sess. 57-58.

> special protection. This is one of the big breeding grounds of deer for the whole southern Sierra region.

While the three southern townships were retained in the park, Mineral King still became a game refuge in the 1926 statute.

Thus, Congress accepted the compromise on the basis that the refuge would adequately protect wildlife. The Forest Service assured Congress before the national refuge was created that it would not even permit grazing in order to protect deer and other wildlife. Now the Forest Service has decided to reject unilaterally the compromise which was embodied in the plain language of Section 688. This language should be strictly construed particularly in the light of the national policy, adopted in the National Environmental Policy Act, to protect this country's remaining wildlife and unspoiled areas of great natural beauty. 42 U.S.C. 4321-4325.

Sequoia National Game Refuge is one of the few wildlife refuges created by Congress. Subsequently, in 1934, Congress passed 16 U.S.C. 694 which delegated to the President the power to create wildlife refuges. Section 694 provides that the President may establish "fish and game sanctuaries or refuges which shall be devoted to the increase of game birds, game animals, and fish of all kinds naturally adapted thereto . . . ." The Senate report on Section 694 stated:[37]

> The purposes of this bill are far-reaching and commendable. Over a period of years, the wildlife of this country has shown a marked decrease due to many causes, the most important ones being:
>
> 1. The advance of civilization which restricts the breeding and feeding grounds of our wildlife.

Thus, the purpose of wildlife refuges is to provide an area where wildlife are protected from the very kinds of activities which the Secretary intends to permit in this case.

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[37]S. Rep. No. 243, 73d Cong., 2d Sess. 1 (1934).

We submit that the construction of any substantial resort in a national game refuge violates Section 688. If an evidentiary hearing is provided, the Sierra Club would be able to demonstrate that the 30-year term permit, even if this were the only permit, would violate the statute because the construction and subsequent activities on this land alone would not be consistent with the wildlife refuge. In any event, we submit that even in its present state the record demonstrates that the combination of the term permit for 80 acres and the revocable permit for 13,000 acres would destroy the refuge.

The ski and summer resort will be on 13,000 of the 15,000 acres in the entire refuge (R. 31, 26, 81, 229-230) and will include accommodations for 3,310 visitors, 10 restaurants, shops, a theatre, 22 ski lifts, and many other facilities (R. 27, 31, 33, 51a-51b, 126, 130-131, 134). As many as 14,000 visitors a day will visit the resort and 17 million visitors a year (R. 28, 53a). The concentration of visitors will, by area available, be twice as great as presently in Yosemite National Park (R. 28). There will be a 5-story parking facility for 3,600 cars (R. 27), and an average of 4,550 automobiles will come daily to the area and 9,850 during peak months (R. 60). There will be "extensive bulldozing and blasting in most lower areas and extensive rock removal at high elevations," the "grooming and manicuring" of most slopes, and "possibly stream channel changing" (R. 32, 128).

Officials of the California Fish and Game Commission have stated "that in an extensive development such as the Disney proposal, considerable wildlife habitat would be lost and wildlife would suffer from human encroachment" (R. 30, 76). The Forest Service itself has found that damage to fish and wildlife will be "critical" (R. 131).

The Secretary has no authority to issue any kind of permit for activity inconsistent with the protection of wildlife. The Secretary has not even attempted a finding that the resort in this case will be consistent with the purpose

of the refuge. If, however, there is any doubt on this issue, the plaintiff should have the opportunity to introduce evidence in the district court to show that the resort will destroy the wildlife habitat and destroy the usefulness of the game refuge.

B. The Secretary of Agriculture Has No Authority To Issue a Permit To Build a Resort on 13,000 Acres of a National Forest

The Forest Service has made its determination to issue Walt Disney Enterprises two permits. First, it intends to grant a 30-year permit for 80 acres of land within both Sequoia National Refuge and Forest (R. 27-28, 166) pursuant to 16 U.S.C. 497:

> The Secretary of Agriculture is authorized . . . (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience or safety . . . .

We do not challenge the authority of the Secretary to issue this term permit insofar as Mineral King is considered as a part of the national forest. As we argued above (pp. 84-89), however, the term permit, as well as the revocable permit, is inconsistent with Mineral King's status as a national game refuge.

Second, the Forest Service intends to grant a purportedly revocable permit for 13,000 acres of land within Sequoia National Refuge and Forest (R. 27-28, 166, 229-230) pursuant to 16 U.S.C. 551:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests . . . and he may make such rules and regulations and establish such service as will insure the

> objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction . . . .

We submit that neither this statute, as its language, history, and administrative construction demonstrate, nor the inherent authority of Secretary of Agriculture allow him to permit the construction of a ski and summer resort on 13,000 acres of land in a national forest. We further submit that 16 U.S.C. 497 precludes him from issuing permits for the use of more than 80 acres of national forest land for a resort.

1. *The Secretary Is Precluded by 16 U.S.C. 497 from Issuing a Permit for a Ski and Summer Resort on 13,000 Acres of National Forest Land*

We submit that the action of the Secretary of Agriculture in granting a permit for the construction of major, permanent facilities on 13,000 acres was an effort to circumvent the restrictions of the statutes limiting his authority to grant term permits in national forests. Besides 16 U.S.C. 497(a), which allows the Secretary to make 30-year term permits for 80 acres for hotels and resorts and under which he granted the permit in Mineral King, the Secretary can enter 30-year permits for 5 acres to construct homes or stores (*id.* at 497(b)); 80 acres for buildings for industrial or commercial purposes (*id.* at 497(c)); and 80 acres for buildings for education or other public use which are owned by governmental or nonprofit agencies (*id.* at 497(d)). He may also lease 2 acres without limitation of time for schools or churches (*id.* at 479) and "suitable spaces . . . near, or adjacent to, mineral, medicinal or other springs" for sanitariums or hotels (*id.* at 495). Thus, Congress has carefully specified the amount of land which can be used in national forests for the construction of permanent facilities including explicitly resorts.

The legislative history of 16 U.S. 497 makes clear that Congress did not intend to allow permits for resorts to extend beyond 80 acres. The Forest Service sought from Congress in 1914 authority to grant term permits without

limitation as to acreage. H.R. 13679, 63d Cong., 2d Sess., provided "that hereafter the Secretary of Agriculture may, when necessary for the purpose of increasing the public benefits or public use of the National Forests, rent or lease to responsible persons or corporations for periods of not to exceed 20 years, suitable spaces or portions of ground for the construction of summer residences, hotels, stores, or any structure needed for recreation or conveience." Congressman Howley stated that "this amendment went into the bill on the special recommendation of the Forest Service." 51 Cong. Rec. 4771.

Congressman Taylor objected to this section at hearings on the bill—"The trouble with making such a law is this. It shuts out a great many people." Hearings on H.R. 13679 before the House Committee on Agriculture, December 12, 1913, 63d Cong., 2d Sess. 304. The bill did not pass. The following year, Congress passed a statute giving the Forest Service the authority to grant term permits for hotels and resorts but limited the amount of land to 5 acres. 38 Stat. 1101.

H.R. 1809, which would have enlarged the authority of the Forest Service to grant permits for hotels and resorts to 80 acres, was introduced in 1947. 80th Cong., 1st Sess. C.M. Granger of the Forest Service testified that extensive activities could not be encompassed within 5 acres and that only a revocable permit could be given for additional land. He then went on (Hearings on H.R. 1809 before the House Committee on Agriculture, June 19, 1947, 80th Cong., 1st Sess. 3):

> Another type [of large acreage use] is the ski lifts which are installed under permits on many of our high country winter sports areas. The ski lift itself, extending up the hill, with suitable space at each end for necessary structures to operate it, and a place to sell tickets and what not—and on most of our winter sports areas we need two or three of those, and it is really better to have them all operated by the same concern under our supervision—and there the aggregate acreage will almost always exceed 5 acres.

> Well those are types of use which we feel are very desirable in the national forest, and under our present set-up, where the acreage exceeds 5, we have to split the permit, giving them one term permit under our existing authority for not more than 5 acres, and the rest of the undertaking has to be covered by the terminable type of permit, which is terminable at the discretion of the Chief of the Forest Service.

Mr. Granger therefore supported the increase in the amount of land which could be leased under a term permit to 80 acres to cover all such extensive activities as ski lifts.

In 1956, Congress responded to this problem by passing legislation allowing the Forest Service to grant term permits for as much as 80 acres for hotels and resorts. 70 Stat. 708, 16 U.S.C. 497. In doing so, Congress made clear that the term permit was intended to include all permanent facilities and not merely a portion of them. The letter of the Secretary of the Interior to the Chairman of the Senate Committee concerning the bill expressly states that S. 2216, which became 16 U.S.C. 497, "would meet needs to grant term permits up to 80 acres for such public and semi-public uses as landing fields, resorts, . . . and ski lifts . . . ." S. Rep. No. 2511, 84th Cong., 2d Sess. 3; H. Rep. No. 2792, 84th Cong., 2d Sess. 3 (1956). With respect to the issues in this case, there can be little doubt that Congress intended that ski lifts and all other facilities should be within the area of the term permit. Thus the so-called revocable permit to be granted by the Secretary of Agriculture violates the 80 acre limit placed by Congress on land in national forests for hotels and resorts.

2. *The Secretary Is Not Authorized by 16 U.S.C. 551 To Issue a Permit for a Ski and Summer Resort on 13,000 Acres of National Forest Land*

The court of appeals held that the Secretary of Agriculture had the authority to issue a revocable permit under 16 U.S.C. 551 (R. 227-228). That Section provides that the Secretary—

> shall make provisions for the protection against destruction by fire and depredations upon the public forests . . . and he may make such rules and regulations . . . to regulate their occupancy and use and to preserve the forests thereon from destruction . . . ."

This provision, on its face, is designed to require the Secretary to protect the forests and allows him to issue regulations to do so. It is not a grant of authority to allow major new uses or to allow an amount of land to be used far exceeding the acreage limitation specifically provided by Congress.

The history of 16 U.S.C. 551 supports this construction. In 1891, Congress gave the President authority to withdraw lands from the public domain for national forest reservations. 26 Stat. 1103, 16 U.S.C. 471. On February 26, 1896, President Cleveland exercised this authority by reserving thousands of acres which had already been homesteaded. Congress was concerned about the problem which resulted (165 Cong. Rec. 902):

> Mr. Carter: In consequence of the hasty and inconsiderate action thus pursued mining towns, villages, patented mining claims, and the homestead claims of actual settlers were included within a reservation and the people thus included were advised by the proclamation that any attempt to cut or to use any of the timber in or about their homes would be visited with the pains and penalties of law.
>
> Mr. Pettigrew: On the 22nd day of February, without any notice, . . . President Cleveland issued his proclamation embracing within the forest reservations 21,000,000 acres of public lands occupied by settlers. We had no notice, no chance to oppose or resist the creation of the reservation, and yet, under the law, the moment that reservation was created by Executive proclamation persons who cut a tree for fire wood or for any domestic purpose would be liable to indictment.

As a result, Section 551 was adopted. 30 Stat. 35. Section 551 thus was designed to give the Secretary of Interior (later the Secretary of Agriculture) authority to allow settlers to cut wood and to carry out other activities incidental to homesteading. Under its authority, for example, numerous permits have been issued for grazing. See *United States v. Grimaud*, 220 U.S. 506, 522 (1911); *Light v. United States* 220 U.S. 523, 537 (1911).[38] There is no suggestion that Congress intended this provision to allow the large-scale development of national forest land.

The interpretation of Section 551 by Congress, the courts, and administrative agencies immediately after its passage further confirms this construction. The Secretary of Interior continued after, as before 1897, to seek specific legislation from Congress, in order to allow railroads to cross national forest land. 30 Stat. 729; *id.* at 783; *Chicago, M. & St. P. Ry. v. United States*, 218 Fed. 288, 293-294 (C.A. 9, 1914), affirmed, 244 U.S. 351. The Court of Appeals for the Ninth Circuit stated that "[i]t must have been the view of Congress that without these enabling acts a railroad company had no right, under the act of 1875, to cross forest reserves; otherwise there was no need of their enactment." *Id.* at 294. Although Section 551 is earlier described in the decision (*id.* at 292), the court did not even think it was relevant enough in determining the authority of the Secretary of Interior to grant permits for railroad lines to mention it in that context.

As a result, in 1899, Congress passed a statute which allowed the Secretary of Interior to grant rights of way to railroads. 30 Stat. 1233. This Court stated that the reason for this statute is that the Secretary of the Interior was previously, "properly so, as we think," seeking separare legislation from Congress for each right of way. *Chicago, Mil-*

[38]Similarly, a more recent decision has upheld regulations of the Secretary of Agriculture promulgated under Section 551 which prohibited the operation of motorized vehicles in an area of a national forest designated as a primitive area. *McMichael v. United States*, 355 F.2d 283 (C.A. 9, 1965).

waukee, & St. Paul Ry. v. United States, 244 U.S. 351, 357 (1917). There would have been no reason for this statute if, in 1897, the Secretary of the Interior had been given authority to issue permits for the construction of facilities like a railroad line or resort.

Subsequently, in 1901, Congress passed a statute authorizing revocable permits for rights of way through national forests for electrical and telegraph lines, canals, ditches and other water conduits, and water plants, dams, and reservoirs. 31 Stat. 790, 16 U.S.C. 79. Large numbers of revocable licenses have been issued under this act and major enterprises have been constructed involving millions of dollars. 30 Att'y Gen. 263, 269 (1914). Again, if Section 551, passed in 1897, allowed the Secretary of Interior to grant revocable permits for such permanent construction as a resort, there would have been no need to pass a new statute allowing him to grant permits for other kinds of construction.

This Court, in 1910, directly construed Section 551. In upholding grazing regulations issued by the Secretary of Agriculture under that section, the Court emphasized that (*United States v. Grimaud, supra,* 220 U.S. at 516):

> The determination of such questions . . . was a matter of administrative detail. . . .
>
> In the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management. Each reservation has its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions, Congress was merely conferring administrative functions . . . .
>
> . . . "[A]n owner may delegate to his principal agent the right to employ subordinates, giving them a limited discretion, so it would seem Congress might rightfully entrust to the local . . . [authorities] the determination of minor matters."

In concluding, the Court made the limited authority conveyed by Section 551 even more clear (*id.* at 523):

> The Secretary of Agriculture could not make rules and regulations for any and every purpose.... As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provisions to protect them from depredations and from harmful uses.

In 1914, Attorney General McReynolds issued an opinion interpreting the 1901 statute concerning electrical and telegraph lines, canals, water plants, and dams. While he specifically described the 1897 statute and the grazing permits granted under it, he made clear that construction of major facilities came only within the 1901 statute. 30 Att'y Gen. 263, 267, 268-269.

Finally, on February 1, 1962, Attorney General Kennedy issued an opinion, which is not yet reported, stating that 16 U.S.C. 551 gave the Secretary of Interior the authority to allow the construction of wagon roads across national forests. However, he again made clear that the 1899 act, not Section 551, authorized the building of railroad lines. While no reason for the distinction is given, a possible explanation is that railroads involve more major and less revocable construction than a wagon road.

The only authority inconsistent with this analysis is a single 1905 opinion of Attorney General Moody which is cited by the court below (R. 227, note 12). 25 Att'y Gen. 470. That opinion states that Section 551 permits the Secretary of Agriculture to grant a permit for a fish saltery, oil and fertilizer plant in a national forest. The opinion goes on to say that a term permit of over one year can be granted.

This opinion is clearly erroneous. Even defendants do not and cannot claim that Section 551 allows term permits to be granted. No other authority exists supporting major construction in a national forest except pursuant to specific statutory authorization. We submit that in the light of the language, history and other administrative interpreta-

tion of Section 551, this opinion is not persuasive. It particularly should not be followed in view of the subsequent passage of 16 U.S.C. 497 which specifically limited term permits to 80 acres.

The court of appeals relied principally on what it regarded as the administrative practice. It quoted (R. 228) from a 1956 House Report (H. Rep. No. 2792, 84th Cong., 2d Sess. 2 (1956)):

> The Department of Agriculture now has adequate authority to issue revocable permits for all purposes under the act of June 4, 1897 (16 U.S.C. 551).

See also S. Rep. No. 2511, 84th Cong., 2d Sess. 1 (1956). The court then said that "[t]he fact that the record discloses that there are now a total of at least eighty-four recreational developments on national forest lands in which there is such a combination of the term permit and the revocable permit is convincing proof of their legality" (R. 229).

We submit that this argument is without foundation. First, as we will show more fully below (pp. 106-110), the so-called revocable permit in this case is not truly revocable either in the law or in fact: (1) the permit cannot be revoked at the discretion of the government because a showing must be made either that the land is needed for a more important public service or the holder of the permit has acted unsatisfactorily (Forest Service Manual Section 2716.3(1) and elaborate administrative review is provided (*id.* at Section 1571.01; 36 C.F.R. 211.20-211.37); (2) it is unlikely, at the least, that the government would or legally could revoke a permit without reasonable cause which would economically destroy a 35 million dollar project constructed in reliance on permits issued by the government; (3) the structures to be built by the developer are permanent in nature; and (4) even if the permit were revoked, the land cannot be restored for the purpose, to protect wildlife, for which it is now dedicated.

Second, the administrative practice is too weak and inconsistent to support the burden placed on it. The administrative practice and construction immediately after a statute has

been enacted is entitled to principal reliance. *E.g., Houghton v. Payne,* 194 U.S. 88, 99-100 (1904); *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, 315 (1933). This case is not unlike *United States v. Leslie Salt Co.,* 350 U.S. 383, 396 (1956), where this Court said that "[a]gainst the Treasury's prior longstanding and consistent administrative interpretation its more recent *ad hoc* contention as to how the statute should be construed cannot stand." Here, as we have seen (pp. 94-96), both Congress and the executive (with only one ruling of the Attorney General to the contrary) construed the 1897 statute for many years not to permit the granting of permits for major construction in national forests. The much later practice of the Secretary of Agriculture ignoring the earlier construction is not entitled to significant weight.

Administrative practice must also be uniform and longstanding to be entitled to weight. *E.g., Iselin v. United States,* 270 U.S. 245, 251 (1926); *United States v. Missouri Pac. Ry.,* 278 U.S. 269, 280 (1929); *Louisville & N. R. Co., v. United States,* 282 U.S. 740, 757 (1931). We have seen that the practice here is not uniform. While we do not know how long the practice of issuing so-called revocable permits for major construction in national forests has existed, we do know that if it has existed for long, it was inconsistent with contemporaneous opinions of Attorneys General. See pp. 95-96 above.

Moreover, the practice of the Secretary of Agriculture is not part of a regulation, a ruling, or any considered construction of the statute. The Secretary's practice amounts to nothing more than an attempt to extend his authority beyond what Congress has granted him.

The courts have frequently refused to rely on such unauthoritative administrative practice. Recently, in *Investment Company Institute v. Camp,* No. 61 and 59, this Term, decided April 5, 1971, the Court refused to give weight to the Comptroller General's interpretation of a statute because, even though the interpretation was embodied in a regulation, "the Comptroller adopted no expressly articulated posi-

tion . . . as to the meaning and impact of the provisions. . . ." In *Baltimore & Ohio Ry. v. Jackson,* 353 U.S. 325, 330-331 (1957), this Court stated that "[i]t is true that administrative determination is entitled to weight . . . but here there has been no expressed administrative determination of the problem." Similarly, in *Toucey v. New York Life Ins. Co.,* 314 U.S. 118, 140 (1941), the Court refused to rely on an alleged administrative practice:

> We are not dealing here with a settled course of decisions. . . . Only a few recent and episodic utterances furnish a tenuous basis for the exception which we are now asked explicitly to sanction.

Accord, *Sanford's Estate v. Commissioner,* 308 U.S. 39, 52 (1939) (lack of published rulings); *United States v. San Francisco,* 310 U.S. 16, 31 (1940); *Nantahala Power & Light Co. v. Federal Power Commission,* 384 F.2d 200, 206 (C.A. 4, 1967), certiorari denied, 390 U.S. 945 (comments by the Commission and its staff).

Third, the only practice which has been called to the attention of Congress has been unclear at best. In 1947, C. M. Granger of the Forest Service testified before the House Committee on Agriculture that since resorts and other major activities could not be encompassed on 5 acres of land, as 16 U.S.C. 497 then provided, the Forest Service was granting revocable permits for additional land. Hearings on H.R. 1809, June 19, 1947, 80th Cong., 1st Sess. He therefore argued on behalf of a bill, H.R. 1809, which would have allowed term permits for resorts for 80 acres. When such a bill passed in 1956, Congress presumably believed that it was eliminating the need for revocable permits for resorts. 70 Stat. 708, 16 U.S.C. 497.

The single, unexplained sentence in the 1956 Reports is at best too unclear to show that Congress knew, and approved, of revocable permits for resorts. It is likely that the sentence means only that the Secretary has ample authority to issue revocable permits for temporary uses which do not require term permits. This interpretation of this sentence

is strongly supported by the letter of the Acting Secretary of Agriculture which is included in the Report and which states clearly that "[u]nder existing laws this Department has adequate authority to issue revocable permits for use for which long-term tenure is unnecessary or undesirable." H. Rep. No. 2792, 84th Cong., 2d Sess. 3 (1956); S. Rep. No. 2511, 84th Cong., 2d Sess. 3 (1956). Moreover, the Forest Services' own Manual states that revocable permits are "generally for use of short duration." Section 2711.2(5).

In 1967, the Subcommittee on Forests of the House Committee on Agriculture held extensive hearings on the permits granted in national forests. Hearings on Management Policies and Other Problems of the National Forests, June 13-16, 1967, 90th Cong., 1st Sess. Arthur Greeley, the Associate Chief of the Forest Service testified that 63,000 term and revocable permits had been issued; that 53,000 involved improvements of some kind; and that the types of uses included homes, airports, mills, schools, stores and ski tows. *Id.* at 4-5. Despite extensive discussion by the Forest Service and representatives of homeowners, there was no indication that the same permit holders had both term permits for the maximum amount of land allowed under Section 497 and revocable permits for additional land. While it was stated that over 11,000 so-called revocable permits were for homes (*id.* at 13), there was no suggestion that such revocable permits were for more land than the 5 acres permitted for homes pursuant to a term permit under Section 497. Indeed, since the Forest Service told the Subcommittee that it allowed prospective homeowners to choose either a term permit or a revocable permit at their option,[39] there is a strong suggestion that the revocable permits for homes were 5 or less acres.

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[39]Hearings before the Subcommittee on Forests of the House Committee on Agriculture, April 20, 1967, 90th Cong., 1st Sess. 14; *id.*, September 27, 1967, p. 10.

The court of appeals noted that "there are now a total of at least eighty-four recreational developments on national forest lands in which there is such a combination of the term permit and the revocable permit . . . ." (R. 229). However, many of these permits may involve situations where no major, permanent facilities have been constructed outside land subject to the 80-acre term permit. In any event, there is no indication that these developments have been called to the attention of Congress, let alone even implicitly approved. The existence of these permits, many in violation of law, cannot justify an additional attempt of the Secretary to dispose of federal forest land in excess of his authority.[40]

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[40]To the extent that substantial interests have grown up based on the Secretary of Agriculture's past action in granting so-called revocable permits for resorts and other major developments, this Court might desire to apply its construction of Section 551 prospectively.

The Court has increasingly in recent years limited its decisions in the field of criminal law prospectively, even though constitutional issues were involved, when the purpose of the new decision would not have been served by retroactive application, when law enforcement agencies had relied in good faith on prior decisions, and when there would have been a serious effect on the administration of justice. *E.g., Johnson v. New Jersey*, 384 U.S. 719, 726 (1966); *Stovall v. Denno*, 388 U.S. 293, 297 (1970). Applying these standards here, there would be little reason to hold that past revocable permits should be invalidated when major investments have been based in reliance upon them and any damage which has resulted to the national forests probably cannot be removed.

These same principles apply to civil cases. See *Linkletter v. Walker*, 381 U.S. 618, 627 (1965). This Court has long recognized that "[t]he past cannot always be erased by a new judicial declaration" (*Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940), and has often refused to apply decisions retroactively. *E.g., Gelpecke v. Dubuque*, 68 U.S. (1 Wall.) 175 (1863) (legality of bonds); *Douglass v. Pike County*, 101 U.S. 677, 687 (1880) (same); *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (unconstitutionality of limiting voters in bond elections to property holders); *Phoenix v. Kolodziejski*, 399 U.S. 204, 214 (1970) (same); *Rabin v. Rowan Memorial Hospital*, 269 N.C. 1, 152 S.E. 2d 485, 499

(continued)

3. *The Secretary Does Not Have the Inherent Authority To Issue Permits Which Are Not Revocable in Law and in Fact*

a. Inherent Authority of the Secretary of Agriculture To Issue Revocable Permits

The court of appeals indicated that the sole authority of the Secretary of Agriculture to issue a so-called revocable permit came from 16 U.S.C. 551 and that he did not have any inherent authority to do so (R. 226). We agree that he has no inherent authority to issue any permits which are not revocable both in law and in fact. Numerous opinions of both the Attorney General and Comptrollers General make clear that federal officials have inherent power to issue only fully revocable permits for the temporary use of federal property.

In 1878, Attorney General Devens ruled that the Secretary of the Navy could allow the city of Chelsea to construct a sewer through the grounds of a naval hospital only if it is a "mere license" which "from its very nature, is revocable at all times either by himself, his successors, or any other officer of the United States having lawful charge of the property."

(1967) (overruling tort immunity of charitable hospitals). "Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano v. City of Houma, supra*, 395 U.S. at 706. It is particularly clear that the construction of a statute by a federal agency can be made prospective if needed to prevent injustice. *Safarik v. Udall*, 304 F.2d 944, 950 (C.A. D.C., 1962), certiorari denied, 371 U.S. 901 (authority of Secretary of Interior to make change of construction of statute affecting oil and gas leases operative prospectively); see *National Labor Relations Board v. Majestic Weaving Co.*, 355 F.2d 854, 860-861 (C.A. 2, 1966); *Chicago v. Federal Power Commission*, 385 F.2d 629, 642 (C.A. D.C., 1967).

16 Att'y Gen. 152. Later, that year, Attorney General Devens described licenses previously authorized by President Lincoln and by one Major General Newton for two railroad rights of way in 1864 and 1869. 16 Att'y Gen. 205, 211-212. Both licenses specifically stated that they "may be revoked at any time by the Executive or the duly authorized agents of the War Department . . . ." *Id.* at 212. Similarly in 1893, Attorney General Miller approved a permit to build an irrigating ditch across a military reservation if it was "revocable at the will and pleasure of the Secretary of War" (19 Att'y Gen. 628, 629 (1890)) and concluded that the Secretary of Treasury "has power to revoke the license at pleasure" of a railroad on a lighthouse reservation (20 Att'y Gen. 527, 529 (1898)).

In 1897, Attorney General McKenna ruled that the War Department could not grant a permit for the construction of a chapel at West Point even if the permit was revocable and even though a statute allowed the Secretary of War to lease property pursuant to a revocable permit (21 Att'y Gen. 537, 538):

> It is not necessary to determine the character of estate which can be created under this section . . . . It seems certain that permanence of right is forbidden by it, and hence it would seem that an occupation which contemplated permanence . . . . is forbidden. A church ediface would seem to contemplate such occupation . . . . As a structure—with integrity preserved—it cannot be removed . . . .

The Attorney General then went on to state that (*id.* at 541):

> The licenses provide for no term, and really commit the Government to a practical perpetuity. It would be idle to deny this—idle to deny that you do not expect to exercise, nor is it expected that you will exercise, the power of revocation except in emergency. Indeed a contention, not without some authority, could be raised that you could not . . . . At any rate the Government would find itself embar-

> rassed either to endure a perpetuity of right in the license or exercise of invidious power.[41]

The Attorney General ruled that the permit was illegal even though he noted that permits for hotels and chapels had occasionally been issued before on army reservations. And later in that same year, he again ruled that a permit for a chapel, reading room, and library would be illegal. 21 Att'y Gen. 565, 566 (1897). See also 22 Att'y Gen. 240, 245 (1898) (Attorney General Griggs) (railroad right of way permit allowable as "a mere revocable license, subject to termination at any time at the will of the Government").

Similarly, in 1911, Attorney General Wickersham concluded that a "revocable license" could be given to lease buildings on naval stations in Puerto Rico but that it would not be proper, "even under the broadest limits of this doctrine, to permit the erection of improvements that would in fact be permanent." 29 Att'y Gen. 205, 207. Attorney General Gregory said that the Secretary of War could grant a permit for a street railway as long as "the occupancy permitted is, and is expressed and thoroughly understood to be, absolutely revocable and subject to termination at any time at the will of the Government . . . ." 30 Att'y Gen. 470, 482 (1915). The Attorney General then went on to say: "It need hardly be added that what I have said on this point has no application to a case when the use granted from its very nature would not be revocable, practically speaking, whatever it might be in form." *Id.* at 483.

This line of opinions was analyzed and summarized by Attorney General Sargent in 1928. 35 Att'y Gen. 485. He noted that many of the structures which had been licensed were permanent in character. "The essential thing is to pre-

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[41] Significantly, the Attorney General also stated that a statute, comparable to 16 U.S.C. 551, authorizing the heads of departments to issue regulations concerning the preservation of property appertaining to their departments, did not authorize the license. 21 Att'y Gen. at 538.

serve unimpaired the title of the United States and its right at any time to occupy and use its property and to prevent any use by the licensee which would permanently damage or destroy the property for government use." *Id.* at 489. The opinion then laid down three requirements for permits as consistent with all the earlier opinions of Attorneys General (*ibid.*):

> (1) the permits are made expressly revocable at will, (2) the structures which the licensee proposes to erect are capable of being removed in case of revocation, and the use to which the licensee proposes to put the land will not permanently damage or destroy it for Government use, (3) the granting of the permit and the use of the property under it will be of direct benefit to the United States.

He then stated that a permit for a railroad right of way must "expressly provid[e] that it may be revoked at any time at the pleasure of the Secretary of War" and "for the removal of all structures by the permittee, and for leaving the property in suitable condition for the Government use . . . ." *Id.* at 490.

Based on similar principles, the Comptroller General has issued opinions that "in the absence of specific statutory authority therefor, Government officers . . . may not legally rent Government-owned property, buildings, or parts of buildings to private parties . . . ." (14 Comp. Gen. 169, 170 (1934); that a license can be made, terminable at 30 days' notice, to plant and cultivate government land (22 Comp. Gen. 563 (1942); that a contractor may obtain the use of government-owned drawings only through a nonexclusive, revocable license (25 Comp. Gen. 909, 911 (1946)). See also 36 Comp. Gen. 561, 563-564 (1957).

These rulings are based squarely on the Article IV, Section 3, Clause 2 of the Constitution. *E.g.*, 34 Att'y Gen. 320, 322-323 (1924); 14 Comp. Gen. 169, 169-170 (1934); 15 Comp. Gen. 96, 97 (1935); 25 Comp. Gen. 909, 911 (1946). As Attorney General Stone stated, after first review-

ing cases of this Court construing this provision (34 Att'y Gen. 320, 322-323):

> It follows, then, that property once acquired by the Government may not be sold, or title otherwise disposed of, except under the authority of Congress, and in the manner provided by law, and this prohibition extends to any attempt to alienate a part of the property, or in general, in any manner to limit or restrict the full and exclusive ownership of the United therein . . . . [I]t has been fully established that Congress is the only authority to be invoked, where there is, in fact, an alienation or what amounts to a transfer or surrender of Government property, by which the title, control or possession of the Government is lost, reduced or abridged. This authority may be generally expressed, or may be specifically granted to permit the disposition in whole or in part of particular property rights. But until that power is given by Congress, expressly or implicitly, the Executive is without power to act.

The Attorney General concluded that a non-exclusive revocable license for a government-owned patent could be made by the Department of the Navy only because such a license "passes no possession of anything tangible, nor reduces the only right granted in a patent . . . ." *Id.* at 329.

Thus, the inherent power of the Secretary of Agriculture in this case must be strictly construed. His authority to grant permits, without express statutory authorization, is merely an exception to the general rule, required by the Constitution, that only Congress can dispose of government property. The exception exists only when the executive branch is in effect not disposing of anything because the license is fully revocable at will and the property of the government can be completely restored.

b. The Lack of Revocability of the Permits in This Case

It is clear, under the standards described above, that the permit granted by the Secretary in this case is not revocable either in law or in fact.

First, the Forest Service Manual provides that annual permits "will be limited to the time actually needed for exercising the use privileges." Section 2711.1-4. Obviously, the 22 ski lifts, a 5-story parking facility for 3,600 vehicles, refuse and sewage facilities, service roads and other facilities on the 13,000 acres covered by the so-called revocable permit (R. 15, 23, 31, 191-192, 229-230) are "actually needed" for the same period of time as the resort as a whole. Since the term permit is for 30 years for the 80 acres on which the alpine village is located, the Manual would seem to give the developers the right to retain the 13,000 acres for an equal amount of time. This construction is supported by the fact that the permit itself does not mention its duration but only states that payment for th permit is to be made anually (R. 23).

Second, the Forest Service Manual states that (Section 2716.3.2):

> Annual permits may be revoked only by an officer superior in rank to the issuing officer:
>
> (a) When there has been a break of the conditions of the permit . . .
>
> (b) At the discretion of the Forest Service; however, this discretion will normally be exercised only:
>
> (1) when the land is needed for more important public purposes, or
>
> (2) when the present use has become unsatisfactory or undesirable.

While the permit itself provides that it "may be terminated upon breach of any other conditions herein or at the discretion of the regional forester or the chief, Forest Service" (R. 24), it seems clear that the developer has all the rights afforded to all permit holders by the Manual.

The holder of the permit has the right to an elaborate review procedure before the permit can be revoked to assure that the criteria in the Manual are complied with. The determination to revoke the permit can be appealed as a matter of right to the Board of Forest Appeals which is

required to hold a quasi-judicial hearing. 36 C.F.R. 211.24. The Board's decision is then reviewable in the courts. *Id.* at 211.25.

Under the Manual and regulations, the Forest Service could only revoke the permit for cause—namely that the land is needed for a more important public purpose or that the owner has used it in an unsatisfactory or undesirable manner. If the Forest Service did attempt to revoke the permit, it is likely that the developer could obtain review not only within the Service itself but in the courts to determine whether the criteria for revocation in the Manual were met. Certainly, the Manual and regulations do not even suggest that the permit could be revoked in the complete discretion of the Forest Service as numerous opinions of the Attorney General require for revocable permits.[42]

Third, most of the opinions of the Attorney General described above conclude that a revocable permit may not be issued if major, permanent structures are to be built. While railroads, electric lines, sewers, and similar facilities may be built, buildings have generally not been permitted. Attorneys General have repeatedly ruled that, even if a permit was legally revocable, it was not revocable in fact when the permit provided for constructing a building. 21 Att'y Gen. 537, 541; 29 Att'y Gen. 205, 207; 30 Att'y Gen. 470, 482; contra, 35 Att'y Gen. 485, 488-489. This same principle was stated by Attorney General Miller in saying that the Secretary of War could not give the State of Oregon a permit to operate a government-built railroad in return for the State constructing facilities needed to operate the railroad (20 Att'y Gen. 93, 95 (1891)):

> The state is to render a valuable consideration for the use of the railway, and it is not reasonable to suppose that it was intended that the State should

[42] Since, as we have shown above (p. 83), the government is not bound by the unlawful acts of its agents, we believe that the Manual and regulations need not be followed and the government can revoke these permits at will. However, at the least, the Manual and regulations seriously interfere with the full discretion of the government to revoke.

> hold its rights at the mere sufferance of the United States. The effect, then, of the arrangement would be to give the State a *vested right* to operate the railway . . . .

The Forest Service has been revoking supposedly revocable permits of homeowners in national forests in order to use the land for public recreation areas. In doing so, it is significant that the Service has been giving 10 years' notice. Hearings before the Subcommittee on Forests of the House Committee on Agriculture, September 27, 1967, 90th Cong., 1st Sess. 2. This strongly supports our contention that once structures have been built on land, permits are no longer revocable in fact at the full discretion of the forest officials even if they may be in law.

In this case, Walt Disney Enterprises will spend 35 million dollars on this development (R. 27, 53a). It will build 22 ski lifts, a 5-story parking facility for 3,600 vehicles, refuse and sewage facilities, service roads, and perhaps other facilities on the 13,000 acres subject to the so-called revocable permit (R. 15, 23, 31, 191-192, 229-230). All the land, certainly not just the 80 acres under the term permit, is needed by the developer since, as the district court found (R. 141-192):

> It is inconceivable that Agriculture would, or could under the terms of the "revocable" permit and the circumstance of its issuance, suddenly and "at will" require the Developer to remove ski lifts, refuse and sewage facilities, parking areas and roads covered by that permit and thus effectively destroy the 35 million dollar investment made by the Developer under his 30 year-80 acre term permit.

It is thus clear that, even if the language of the Forest Service Manual supported the contention that the permit is revocable, in fact this permit is not revocable in the complete discretion of the Secretary of Agriculture.

Finally, Attorney General Sargent ruled that a revocable permit may be issued only if all structures may be removed

without permanently damaging the land for government use. 35 Att'y Gen. 485, 489 (1928). While the permit in this case would require the developer, upon revocation of the permit, to remove the structures and restore the site (R. 16), restoration of the site will be impossible. The developer proposes to build major facilities all over the area. There will be "extensive bulldozing and blasting in most lower areas and extensive rock removal at high elevations" and "a great deal of earth and debris removing" (R. 32, 128). The physical scars of this use could not be removed for generations, if ever. And the damage to the use of the land as a wildlife refuge, the use which has been prescribed by Congress, would continue long into the future. See p. 88 above.

For all these reasons, the permit in this case for the use of 13,000 acres of land is not truly revocable. The court of appeals implicitly agreed by stating that the authority of the Secretary to grant this permit did not come under the authority of executive agencies to grant fully revocable permits but rather under 16 U.S.C. 551 (R. 227-228). Thus, the permit for use of 13,000 acres cannot be granted by the Secretary of Agriculture without authority from Congress. And, as we have seen above, no such authority has been granted. In short, this record demonstrates that the 13,000 acre permit is not revocable, does not come within any statutory or other authority of the Secretary of Agriculture, and violates 16 U.S.C. 497.

C. The Secretary of Interior Has No Authority To Allow a Major Highway To Be Constructed Across Sequoia National Park Which Will Harm the Park and Which Will Be Solely Used To Allow Visitors To Travel to a Commercial Resort Outside the Park

Testimonials to the superb beauty of Sequoia National Park are abundant. Franklin Lane, Secretary of the Interior testified in 1919 in regards to Sequoia National Park that "I think perhaps the lovers of high mountain scenery regard

this as the choicest place in the whole United States."[43] The Park Service states of this park: "This is a vast region of unbroken wilderness, of mountains, canyons, rivers, lakes, and meadows . . . where you can find the unspoiled and spectacular natural scene."[44] The National Parks Association stated in 1921 about the proposed park: "We shall have added to our National Park System an area which, for the wide variety of its forest canyon and mountain exhibits and the impressive climaxes it contains of each kind, surely surpasses any other area of any kind in the United States. The hugest trees, the deepest and wildest valleys, the broadest sea of snow capped peaks, and the loftiest mountains are right here. It will be literally the national park of superlatives. Perhaps the whole world of scenery crowds as many and as diversified capital features into no other single region."[45]

Undoubtedly because of its superlative qualities Congress has taken a special interest in Sequoia National Park. The Park was the second national park created in 1890 only after Yellowstone. Congress has passed a series of special statutes relating only to Sequoia National Park (16 U.S.C. 43, 45a-1, 2, 3, 45b, 45c, 45d, 45e) and others relating only to Sequoia and Yosemite (16 U.S.C. 57, 58, 60, 61, 62, 63, 64, 65, 78, 79).

The Secretary of Interior authorized, after considerable reluctance (R. 65, 136, 139), the construction of a major, high-speed highway across 9.2 miles of Sequoia National Park (R. 54, 62-63, 65, 161, 187). The present road is a narrow, twisting, dirt road which now handles an average of only 95 cars daily and is inadequate to carry a large number of automobiles (R. 28, 63, 144). While the new highway

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[43]Hearings on H.R. 10929 before the House Committee on Agriculture, January 21, 1919, 65th Cong., 3d Sess. 14.

[44]*Sequoia and Kings Canyon*, National Park Service Pamphlet, p. 8 (rev. 1968).

[45]National Parks Association Bulletin # 23, Dec. 14, 1921, p. 1.

will have the same terminus points, it will be on an almost entirely different alignment (R. 61). The roadbed will be 28 feet wide at a minimum (R. 148), have a third lane for passing in many places (R. 54, 61), and have embankments of up to 800 to 1000 feet (R. 148). It will carry an average of 4,550 automobiles a day and 9,850 at peak periods (R. 60). It is likely, based on predictions of use of the resort, that the highway will not carry the traffic adequately and further construction will be needed (R. 136-138, 155-157).

The road connects a state highway with a commercial resort (R. 161). It is intended, as the district court found, to serve the resort (R. 149; see R. 54, 58, 140, 143) since the National Park Service has no plans to develop the area of the Park near the highway (R. 36). The route across the park is not the only route to the planned resort, but it is the cheapest (R. 66).

There is considerable danger that the highway will seriously harm the park. A consultant to the Park Service concluded that the road will be a barrier to wildlife such as deer, wolf, mountain lions, bear and horn sheep. "The retention and control of these species would be affected if relatively free movement up and down their slopes was not maintained" (R. 143). The Park Service has expressed fears about the effect of the road on Sequoia trees (R. 62, 67) and a consultant to the California Division of Highways found that 45 Sequoias "are in a position of possible jeopardy because of road construction" (R. 85, 123).

There is no dispute that the Secretary of Interior generally has authority to construct roads in national parks. 16 U.S.C. 8 provides:

> The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails . . . in the national parks . . . .

However, this construction must comply with other applicable federal statutes.

We submit that the construction of a major highway across Sequoia National Park violates federal law for two reasons. First, the highway will cause serious damage to the natural beauty, giant sequoias and wildlife in the park and is therefore inconsistent with federal statutes requiring the Secretary to protect the park. Second, the sole purpose of the highway is to get visitors to a commercial resort outside the park and is therefore inconsistent with federal statutes requiring the Secretary to use park land only for park purposes.

1. *The Proposed Highway May Not Be Constructed Because It Seriously Threatens the Park*

Congress has passed three separate statutes requiring, not simply authorizing, the Secretary of Interior to adopt rules and regulations to protect the park. 16 U.S.C. 43, 45b, 61.

16 U.S.C. 43, first adopted in 1890 when the park was created, now states:

> Sequoia National Park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations *shall* provide for the preservation from injury of all timber, mineral deposits natural curiosities or wonders within said park, and their retention in their natural condition. (emphasis added)

In 1926, when the park was enlarged, Congress passed 16 U.S.C. 45b:

> The said park shall be under the exclusive control of the Secretary of Interior, whose duty it shall be as soon as practicable, to make and publish such reasonable rules and regulations . . . as he may deem necessary or proper for the care, protection, management, and improvement of the same, such regulations being primarily aimed at the freest use of said park for recreation purposes by the public and for the

> preservation from injury or spoliation of all timber, natural curiosities, or wonders within said park and their retention in their natural condition as far as practicable, and for the preservation of said park in a state of nature . . . . Such rules and regulations shall provide against the destruction of wild life within said park . . . .

Finally, 16 U.S.C. 61, added in 1920 (41 Stat. 732), provides as to both Sequoia and Yosemite National Parks:

> [T]he Secretary of the Interior shall make and publish said general rules and regulations as he may deem necessary and proper for the management and care of the park and for the protection of the property therein, especially for the preservation from injury or spoliation of all timber, mineral deposits . . . , natural curiosities or wonderful objects within said parks . . . .

Similarly, 16 U.S.C. 1 which created the National Park Service and which applies to all national parks provides that:

> [T]he service . . . shall promote and regulate the use of the Federal areas known as national parks . . . by such means and measures as conform to the fundamental purpose of the said parks . . . which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

Congress has recently reiterated, almost in identical language, that this is the purpose of the national parks. 16 U.S.C. 20; S. Rep. No. 1495, 85th Cong., 2d Sess. 1 (1958).

Congress has also recently expressed, in creating a unified national park system, a strong national policy in protecting the national parks (16 U.S.C. 1a-1):

> Congress declares that the national park system . . . has . . . grown to include superlative natural, historic and recreation areas in every major region of the United States . . . ; that these areas, though distinct in character, are united through their inter-

> related purposes and resources into one national park system as cumulative expressions of a single national heritage; that, individually and collectively, these areas derive increased national dignity and recognition of their superb environmental quality through their inclusion jointly with each other in one national park system preserved and managed for the benefit and inspiration of all the people of the United States . . . .

It is therefore clear that Congress intends that federal statutes designed to protect the national parks be strictly construed and applied. These statutes are plain that the Secretary must ensure that all activities within the park, including roads, must be consistent with preserving the natural beauty, trees, and wildlife in the park.

The history of the park demonstrates that the Secretary has no authority to allow the construction of a major highway across the park to a commercial resort. When Congress was considering a bill to enlarge the park in 1926, Congressman Rankin asked Congressman Barbour, the sponsor of the bill to enlarge the park: "How about roads and driveways through it?" Mr. Barbour replied, "I will say to the gentlemen it is proposed to make this a trail park and keep it a trail park. The roads now leading into the park go into the Giant Forest of the present park." 67 Cong. Rec. 19143. Mr. Barbour was not quite correct because a narrow road to Mineral King had existed even before the park was created (R. 28). Since that time, only Generals Highway has been added to connect General Grant Grove with other parts of Sequoia National Park. Consequently, until now, the intention of Congress has been observed that Sequoia National Park remain essentially a trail park.

This history shows that Congress intended the statutes which protect the national parks generally and Sequoia National Park particularly to protect Sequoia National Park from even the kind of roads which existed as of 1926. Clearly, Congress intended to prohibit the kind of major, high-speed highway which is now planned.

Congress has also adopted strong Federal policies with regard to protecting parkland from highways in the Department of Transportation Act of 1966 and Federal Aid to Highway Act of 1968. 49 U.S.C. 1653(f); 23 U.S.C. 138. While these policies were adopted in the context of federal highways, in contrast to the state highway in this case, they strongly support strict interpretation of the statutes, upon which we rely, relating to protection of the national parks. For there is every reason to believe that Congress intends even greater protection of the national parks than of other kinds of parkland.

We submit that the evidence in this record is adequate to demonstrate that this highway, particularly since it serves no park purpose, so seriously threatens the park that the Secretary of Interior has no authority to permit its construction. If, however, this Court finds that this issue is not clear, we submit that plaintiff is at least entitled to present evidence in the district court.

2. *The Proposed Highway May Not Be Constructed Because It Serves Commercial Non-Park Purposes*

It is also clear that all activities in the park must be designed to assist visitors in enjoying the park itself. 16 U.S.C. 41, which created the park states that it is "dedicated and set aside as a public park, or pleasure ground, for the benefit and enjoyment of the people. . . ." 16 U.S.C. 466 provides that the Secretary shall make regulations "primarily aimed at the freest use of said park for recreation purposes by the public. . . ." 16 U.S.C. 1 requires the National Park Service to regulate the use of all the national parks to "conform to the fundamental purpose" to provide for the enjoyment of "the scenery and the natural and historic objects and the wildlife therein." There is no authority for allowing park land to be used simply to get to a commercial resort.

As an earlier Secretary of the Interior defined his duties, "Every activity of the [Park] Service is subordinate to the duties imposed upon it to faithfully preserve the parks for posterity in essentially their natural state. The commercial use of these reservations, except as specially authorized by law, or such as may be incidential to the accommodation and entertainment of visitors, will not be permitted under any circumstances."[46]

A House report has recently specifically stated that 16 U.S.C. 8, upon which the Secretary relies for his authority to build roads in national parks, does not allow construction of highways for non-park purposes. In reporting a bill creating Padre Island National Seashore (16 U.S.C. 459d), Congress said that the Park Service could only build roads to allow the public to visit the area (H. Rep. No. 2179, 87th Cong., 2d Sess. 5 (1962)):

> The National Park Service already has authority to construct within any area which it administers such roads and trails as are needed for public use of the area (. . . 16 U.S.C. 8). The committee is of the opinion that to require the National Park Service to construct a through highway for general public convenience in the Padre Island National Seashore would give it a function which does not properly belong to it. . . .

The Department of Interior has itself determined that roads cannot be constructed in national parks for purposes such as those in this case (Park Road Standards, U.S. Department of the Interior, National Park Service, May 1968) (R. 37)):

> Park roads are not continuations of the State and Federal network. They should neither be designed—nor designated—to serve as connecting links. Motorists should not be routed through park roads to reach ultimate destinations.

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[46]Franklin Lane, "Statement of National Park Policy," 1918, as quoted in Farquhar "Legislative History of Sequoia and Kings Canyon National Parks," *supra*, p. 48.

Only a few years ago, in 1965, Congress passed a statute designed to protect national parks from damage caused by the construction of facilities even for park visitors. 16 U.S.C. 20. After restating "the fundamental purpose [of national parks] of conserving their scenery, wildlife, natural and historic objects," Section 20 went on:

> [T]he Congress hereby finds that the preservation of park values requires that such public accommodations, facilities and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair those values and so that development of such facilities can best be limited to locations where the least damage to park values will be created. *It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located* and that are consistent to the highest practicable degree with the preservation and conservation of the areas (emphasis added).

This statute applies to highways as facilities or services which can seriously harm the park. Since the statute limits even highways and other facilities and services for visitors of the park itself, it *a fortiori* applies to a highway not even serving the park. Indeed, the statute specifically prohibits such a highway by prohibiting the development of facilities and services not "limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located. . . ."

Similarly, the Secretary of Interior may only "grant privileges, leases, and permits for the use of land for the accommodation of visitors in the various parks. . . ." 16 U.S.C. 3. Just as he could not allow a hotel to be built in the park to accommodate visitors to the commercial resort at Mineral King, he cannot allow the building of a highway across park park land for this purpose.

The court of appeals held that the proposed highway could be built because a road already exists across the park to Mineral King (R. 231):

> We know of no law and find little logic in a contention that a twisting, substandard, inadequate road through 9.2 miles of the park is legal but that an improved all weather two lane highway . . . is illegal.

However, the existing road was in existence before the park was created (R. 28). It is a narrow, twisting, oiled dirt road which now carries an average of 95 vehicles a day; it could not handle anywhere near the number of vehicles as the proposed modern, high-speed highway (R. 28, 60, 144, 187). The authority to retain an existing road of this type in no way implies that the Secretary of Interior has the right to allow the construction of a major new highway.

It is therefore clear that, under both federal statutes and the Department of Interior's own standards, highways cannot be built across national parks for commercial, non-park purposes. The evidence is this case establishes without contradiction that this is the purpose of this road. We therefore submit that this Court should hold that the Secretary has no authority to permit its construction.

D. The Secretary of Interior Has No Authority To Allow An Electrical Transmission Line To Be Constructed Across Sequoia National Park

The construction of an electrical transmission line is planned across Sequoia National Park to serve the ski and summer resort (R. 40).[47] We submit that the Secretary of Interior has no authority to allow this line to be constructed.

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[47]While this issue was not raised by plaintiff specifically in its complaint, both the district court and court of appeals considered it properly before them (R. 194-195, 231-232).

1. *The Electrical Transmission Line May Not Be Constructed Without Approval from Congress*

Early in this century, Congress gave the Secretary authority to allow electrical lines to cross Sequoia National Park and national parks generally. In 1901, Congress gave the right to grant revocable "rights-of-way through the public lands, forest and other reservations of the United States, and Yosemite and Sequoia National Parks, for electrical plants, poles and lines for the generation and distribution of electrical power. . . ." 16 U.S.C. 79. Subsequently, in 1911, Congress gave the Secretary of Interior the authority "to grant an easement for rights-of-way, for a period not exceeding fifty years . . ., over, across and upon the public lands and reservations of the United States [including national parks] for electrical poles and lines for the transmission and distribution of electrical power. . . ." 16 U.S.C. 5.

In the 1920's, Congress limited this authority of the Secretary both as to Sequoia and all national parks. In 1921, Congress passed a statute limiting the powers of the Federal Power Commission to allow hydroelectric development in national parks (16 U.S.C. 797a):

> [N]o permit, license, lease or authorization for dams, conduits, reservoirs, powerhouses, commission lines or other works for storage or carriage of water or for the development, transmission, or utilization of power, within the limits as constituted March 3, 1921, of any national park or national monument shall be granted or made without specific authority of Congress.

In 1926, in the same statute which enlarged Sequoia National Park, Congress provided (16 U.S.C. 45c):

> [N]o permit, license, lease or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water or for the development, transmission, or utilization of power within the limits of said park [Sequoia National

> Park] . . . shall be granted or made without specific authority of Congress.

Section 45c went beyond Section 797a by applying to all of Sequoia National Park since Section 797a applied to only the portion before enlargement in 1926. Section 450 is a special provision applying only to Sequoia National Park and no such provision has been adopted by Congress applying generally to land included in the national parks after 1921. Thus, this statute is one of many in which Congress has given special protection to Sequoia National Park even beyond that afforded other national parks.

Section 45c was adopted as part of the enlargement of Sequoia National Park in 1926 (44 Stat. 820), in part at the request of M. B. Greeley, Chief of the Forest Service. At hearings upon an earlier park enlargement bill in 1921, he stated as the Forest Service's position: "You cannot admit power development in canyons of that character [referring to canyons in the proposed enlargement] with artificial reservoirs and conduits, the erection of transmission lines, power dams, pipelines and all the rest of it, without largely destroying its natural character. I have seen this come about in a great many places in the West. It is not complete destruction, but the wonders of that country as a piece of nature's handiwork are going to be largely destroyed if commercial development sets in."[48] At another point in the same hearings, Greeley stated, "If the area is to be a national park its recreational and scenic values should be fully and absolutely protected so that they cannot be broken into by commercial development unless Congress should so decide."[49]

The statutory framework is therefore as follows: 16 U.S.C. 5 and 79 give the Secretary of Interior authority to allow the construction of all kinds of electrical lines (transmission or distribution) across Sequoia National Park. 16 U.S.C. 45c requires the Secretary to have approval from Congress before

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[48]Hearings on H.R. 7452 by the House Committee on Agriculture, December 13, 1921, 67th Cong., 2d Sess. 12.

[49]*Id.* at 11.

permitting electrical transmission lines in Sequoia National Park. Thus, if the electrical line in this case is a transmission line rather than distribution line, Congress has forbidden the Secretary from giving authorization for it.

The distinction between a transmission line and distribution line must be made, as with all statutory language, according to the "natural" and "ordinary" meaning of those words. *E.g., United States v. Temple,* 105 U.S. 97, 99 (1881); *Lynch v. Alworth-Stephens Co.,* 267 U.S. 364, 370 (1925); *Old Colony R.R. v. Commissioner,* 284 U.S. 552, 560 (1932); *Commissioner v. Brown,* 380 U.S. 563, 571 (1965).

The record in this case suggests, but is not absolutely clear, that the electrical line to be constructed will be a transmission line. The 1964 National Power Survey of the Federal Power Commission states (p. 27) that "[T]ransmission voltage presently in use range from 69 kilowatts to 345 kilowatts. Lower voltages are generally associated with distribution lines. Since the record indicates that the line in this case will be 66 kilowatts (R. 40), which is not a standard voltage, it is likely that the line will be carrying 69 kilowatts. This issue—whether the line is a transmission or distribution line—can only be resolved through an evidentiary hearing in the district court.

The court of appeals held that 16 U.S.C. 45c applies "only to the construction and development of hydroelectric projects and related facilities including power lines" (R. 232). If the court of appeals is correct, then the issue as to whether the proposed line is a transmission or distribution line is irrelevant since the Secretary can authorize either kind of line as long as it is independent, as in this case, of a hydroelectric project. We submit that this issue should be resolved by this Court so that the district court can apply the appropriate law in its hearing on remand.

There is no doubt that the principal purpose of 16 U.S.C. 45c was to prohibit hydroelectric projects in Sequoia National Park. As the testimony of M. B. Greeley quoted above shows, there was great concern that the valleys of Sequoia National Park would be permanently flooded by

hydroelectric projects. The Sierra Club urged the enlargement of Sequoia National Park in order to protect the valley floors.[50] And a Senate Committee report preceding the 1926 act states that the language of 16 U.S.C. 45c was adopted to "prohibit the development of hydroelectric power in the . . . enlarged park." H. Rep. No. 583, 67th Cong., 2d Sess. 2 (1922).

Nonetheless, while Congress was principally interested in enacting Section 45c preventing the construction of hydroelectric projects without its own approval, it explicitly went further. If it had intended to prohibit only hydroelectric projects, it could simply have prohibited dams, reservoirs, and the like which are absolutely essential to such projects without the approval of Congress. Instead, Congress also specifically prohibited transmission lines without its approval.

This Court has often said that statutes should be construed according to their plain meaning. As Chief Justice Marshall stated early in the history of this Court in *Pennington v. Coxe*, 6 U.S. (2 Cranch) 34, 52-53 (1804): "That a law is the best expositor of itself . . . are among those plain rules laid down by common sense for the exposition of statutes which have been uniformly acknowledged." This Court has often held that legislative history need not be relied upon when "the words of the Act are plain and their meaning is apparent without the necessity of resorting to the extraneous statements and often unsatisfactory aid of [committee] reports." *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 347, 356 (1922). Accord, *e.g., Wilbur v. United States*, 284 U.S. 231, 237 (1931); *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85, 89 (1935). Similarly, the words of a statute cannot be ignored in order to construe it according to its general purpose. *Hadden v. Collector*, 72 U.S. (5 Wall.) 107, 111 (1866); *Commissioner v. Gordon*, 391 U.S. 83, 93 (1968).

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[50] 12 *Sierra Club Bulletin* 77 (1924); *id.* at 298 (1926).

We submit that an electrical transmission line, as 16 U.S.C. 45c specifically states, cannot be built without the approval of Congress. If this Court so holds, an evidentiary hearing should be held in the district court to determine whether the proposed electrical line is a transmission line within the meaning of the statute.

2. *The Electrical Transmission Line May Not Be Constructed Because It Serves Commercial Non-Park Purposes*

We have seen above (pp. 116-119) that the Secretary of Interior has no authority to allow a highway to be built across Sequoia National Park for a non-park purpose. The same argument applies equally to an electrical transmission line. Consequently, whether the line is a transmission or distribution line, it is not within the power of the Secretary to authorize.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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June 1971.

FOLD-OUT IS TOO LARGE TO BE FILMED

Supreme Court, U.S.
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No 70-34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

~~No. 989~~

SIERRA CLUB, a California corporation,

Petitioner,

vs.

ROGERS C. B. MORTON, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,

Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

and

BRIEF OF AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION, IDAHO PUBLIC LANDS RESOURCES COUNCIL, NATIONAL FOREST PRODUCTS ASSOCIATION, NATIONAL WATER RESOURCES ASSOCIATION, OREGON FIELD TRIAL COUNCIL, OUTDOORS UNLIMITED, INC., AND PUBLIC RESOURCES COUNCIL OF OREGON, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 939.

SIERRA CLUB, a California corporation,

Petitioner,

vs.

ROGERS C. B. MORTON, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE ON BEHALF OF AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION, IDAHO PUBLIC LANDS RESOURCES COUNCIL, NATIONAL FOREST PRODUCTS ASSOCIATION, NATIONAL WATER RESOURCES ASSOCIATION, OREGON FIELD TRIAL COUNCIL, OUTDOORS UNLIMITED, INC., AND PUBLIC RESOURCES COUNCIL OF OREGON, IN SUPPORT OF RESPONDENTS.

TO THE SUPREME COURT OF THE UNITED STATES:

Pursuant to Rule 42 of the Rules of this Court American National Cattlemen's Association, Idaho Public Lands Resources Council, National Forest Products Association, National Water Resources Association, Oregon Field Trial

Council, Outdoors Unlimited, Inc., and Public Resources Council of Oregon, respectfully move this Court for leave to file the attached brief as *amici curiae* in support of the respondents herein. Respondents have consented to the filing of that brief. Petitioner has not.

The Interest of the Movants.

The movants are organizations and associations which have as their members users of national forests and parks (public lands), as well as persons vitally concerned not only with the conservation, but also the proper multiple utilization, of the vast natural resources contained on and constituting the public lands of the United States. Their members include those interested in each of the multiple uses of the national forests within the Congressionally stated national policies for the occupancy and use of such forests, *i.e.*, outdoor recreation, range, timber, watershed and wildlife and fish purposes, as well as in securing favorable conditions of waterflows and in furnishing a continuous supply of timber for the use and necessities of citizens of the United States, and in the Congressionally mandated uses of national parks.

Each movant is concerned with the issue of the standing of the petitioner to contest administrative decisions of the Secretaries of Agriculture and Interior over the use of national forests and parks. Although each movant may, in a particular situation, abstractly wish to contest a decision of the respondents charged with administration of the occupancy and use of public lands, as does the petitioner here, the movants are of the view that for the sake of orderly administrative procedures and of the interests of all those concerned with the multiple uses of public lands,

such agency decisions should be challengeable in the federal courts only by persons or organizations who have or will suffer injury in fact from such decisions and who shall have first exhausted such administrative remedy or remedies as may be available, and not by self-appointed agents of such persons or organizations.

Movants, who are as vitally interested as the petitioner in conservation aspects of the administration of public lands, also represent a broad cross section of the heterogeneous multiple users of such lands, who will be directly affected by this Court's resolution of the issue of standing.

The Reasons for a Brief Amici Curiae.

The court below held that the petitioner's asserted general interest in conservation matters was abstract and hence insufficient to support the litigation. *Sierra Club* v. *Hickel,* 433 F. 2d 24, 30 (9th Cir. 1970). Each movant is equally concerned with the issue of the standing of a petitioner with such an asserted general or abstract interest to contest administrative decisions of the Secretaries of Agriculture and Interior over the occupancy and use of public lands, because the standing of one class of users, i.e., conservationists, can or may directly affect adversely the other multiple users of such public lands.

The movants, as broadly representative associations of multiple users of public lands of the United States, seek leave to file a brief *amici curiae* in order to bring to the attention of the Court the probable effects of a reversal of the decision below on the standing issue upon the Congressionally ordained multiple use and other policies governing occupancy and use of national forests and national parks.

WHEREFORE, the movants respectfully request leave to file and serve a brief *amici curiae* in the form attached to this motion in support of the affirmance of the order of the court below.

Respectfully submitted,

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July 8, 1971.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 939.

SIERRA CLUB, a California corporation,

Petitioner,

vs.

ROGERS C. B. MORTON, individually, and as Secretary of the Interior of the United States; JOHN S. McLAUGHLIN, individually, and as Superintendent of Sequoia National Park; CLIFFORD M. HARDIN, individually, and as the Secretary of Agriculture of the United States; J. W. DEINEMA, individually, and as Regional Forester, Forest Service, and M. R. JAMES, individually, and as Forest Supervisor of the Sequoia National Forest,

Respondents.

BRIEF OF AMERICAN NATIONAL CATTLEMEN'S ASSOCIATION, IDAHO PUBLIC LANDS RESOURCES COUNCIL, NATIONAL FOREST PRODUCTS ASSOCIATION, NATIONAL WATER RESOURCES ASSOCIATION, OREGON FIELD TRIAL COUNCIL, OUTDOORS UNLIMITED, INC., AND PUBLIC RESOURCES COUNCIL OF OREGON, AS AMICI CURIAE IN SUPPORT OF RESPONDENTS.

INTEREST OF THE AMICI CURIAE.

The *amici curiae* are organizations and associations which have as their members users of national forests and parks (public lands), as well as persons vitally concerned not only with the conservation, but also with proper multiple

utilization, of the vast natural resources contained on and constituting the public lands of the United States. Their members include those interested in each of the multiple uses of the national forests within the Congressionally stated national policies for the occupancy and use of such forests, *i.e.*, outdoor recreation, range, timber, water shed and wildlife and fish purposes, as well as in securing favorable conditions of waterflows and in furnishing a continuous supply of timber for the use and necessities of citizens of the United States, and in the Congressionally mandated uses of national parks.

The public lands of the United States, typified by the national forest and park involved in this litigation, constitute vast federally owned and controlled natural resources, the use and occupancy of which affects the lives and well being of nearly all citizens of the United States. Inventories of standing timber, for example, the raw material for conversion into the nation's needed forest products, are heavily concentrated in such federal ownership, to the extent that Congressional Committees and the United States Forest Service acknowledge a government monopoly position in selling softwood timber.[1] Those same public lands afford millions of acres for range uses, and are the source and, indeed, the head waters of much of the nation's water resources. Collectively, such public lands constitute a vast natural resource for outdoor recreation and the conservation of wildlife and fish. The administration of the occupancy and use of such federally owned natural resources by the Secretaries of Agriculture and Interior, i.e., the means by which the general public can utilize those

1. See Senate Report No. 1118, on The Impact of Increasing Log Exports on the Economy of the Pacific Northwest, 90th Cong., 2d Sess., pp. 8-9 (1968); Hearings before the Subcommittee on the Department of the Interior & Related Agencies of the House Committee on Appropriations, 88th Cong., 1st. Sess., p. 1343 (1963).

unique resources, therefore directly or indirectly affects nearly all citizens of the United States. Accordingly, standing to sue in the federal courts to intercept such administration by one class of users directly affects the vital interests of all or most other users.

Each *amicus curiae* is concerned with the issue of the standing of the petitioner to contest administrative decisions of the Secretaries of Agriculture and Interior over the use of national forests and parks. Each is of the view that for the sake of orderly administrative procedures and of the interests of all those concerned with the multiple uses of public lands, such agency decisions should be challengeable in the federal courts only by persons or organizations who have or will suffer injury in fact from such decisions and who shall have first exhausted such administrative remedy or remedies as may be available, and not by self-appointed agents of such persons or organizations with, at most, a subjective concern for conservation.

The *amici curiae,* who are as interested as the petitioner in the conservation aspects of the administration of public lands, also represent a broad cross section of the heterogeneous multiple users of such lands, who will be directly affected by this Court's resolution of the issue of standing.

THE QUESTION PRESENTED.

Whether the Sierra Club, a national conservation organization, has standing to challenge a decision by the Secretaries of Agriculture and Interior to develop the Mineral King Valley in California for public recreation and the concomitant decisions to accomplish that development through private contractors and permittees.

STATEMENT OF THE CASE.

The *amici curiae* adopt as their statement of the case the statement contained in the Brief for Respondents.

SUMMARY OF ARGUMENT.

Petitioner should not be permitted to sue solely on the basis of its professed concern for the conservation of the Sierra Nevada Mountains.

To open carefully made administrative decisions to judicial review by persons or organizations who in fact can allege no injury dissipates, if not destroys, the essential advantages of the administrative process, *i.e.*, decisions made expeditiously, uniformly, with expertise and with finality. The economic well-being of a large region of the nation is dependent upon such administrative decisions respecting use of public lands. To permit the abstract interests of the uninjured petitioner, time after time, to delay and threaten decisions as to the use of public land works an unjustified hardship on vast numbers of persons and communities whose vital interests are dependent on orderly and uninterrupted use of such lands. Such hardship is also borne by the judiciary.

Petitioner cannot properly claim injury done to its members as a basis for its standing. Petitioner has shown no needed exception to this fundamental principle. To find otherwise would be to disregard the availability of class actions and the application of *res judicata* to class members. Here, though petitioner purports to represent its members' interests, in fact such members would not be bound by an adverse decision and would be free to relitigate.

Standing based on injury in fact is a sound rule, because it is simply applied, objective, and will not lead to injustice

to persons claiming harm. To resort to naked concern for conservation as a basis for standing, the result if petitioner is held to have standing here, would be an undesirable substitution of a subjective rule that would be virtually impossible of application by the federal courts.

Statutes cited by petitioner do not indicate that uninjured persons or organizations possessing at most an abstract concern are intended to be protected or given any statutory right to sue.

ARGUMENT.

I. Standing Gained Upon Petitioner's Naked Assertion of Concern for Conservation of Natural Resources Can Destroy the Administrative Process and Work Hardship on Users of Public Lands.

In essence, petitioner claims a right to sue solely on the basis of a professed concern for the conservation of national parks, game refuges and forests, particularly with respect to the Sierra Nevada Mountains. Petitioner fails to allege any injury either to itself as a corporation or to any of its members.[2] Petitioner thus seeks to test the proposition whether a naked assertion of concern for conservation of natural resources will, alone, accord standing.

This Court, however, has adhered to the fundamental principle that a plaintiff has standing to sue in the federal courts only (a) when it has alleged that the challenged action has caused it "injury in fact," economic or otherwise, and (b) when the injured plaintiff is arguably within a statutorily or constitutionally protected "zone of interest." *Association of Data Processing Service Organizations* v. *Camp,* 397 U. S. 150, 152, 153 (1970); *Barlow* v. *Collins,* 397 U. S. 159, 164 (1970); and *Investment Company Institute* v. *Camp,* 39 U. S. L. Week 4406, 4407 (U. S. April 5, 1971).

The present proceeding demonstrates several sound reasons for adherence to those standing criteria:

Litigation such as this is a burden not only for parties but also for non-parties affected by the issues here in contention, irrespective of the eventual outcome on the

2. Complaint, para. 3, referred to in Judge Sweigert's opinion, A. 4, 197.

merits. Where such litigation follows an extended administrative process involving a nationally owned and controlled natural resource and affects a wide range of economic and non-economic interests of both parties and non-parties, the burdens, delays and uncertainties arising from the litigation are particularly pronounced.

A party who has suffered a real and not an abstract injury by reason of administrative decisions should have recourse to the courts to test issues appropriate for review. The Administrative Procedure Act contemplates such review by persons who are "adversely affected" or "aggrieved" by agency action within the meaning of the relevant statutes. 5 U. S. C. § 702.

However, to permit a party who has not suffered a personal injury to use the federal courts to dissect administrative decisions of the Secretaries of Agriculture and Interior and to interpose the delays and burdens of litigation on the affected parties and the multiple users of such a natural resource is a result not founded upon precedent, is destructive of the administrative process, and is grossly unfair to those directly and indirectly affected thereby.

Administrative procedures, such as those here involved, are established to facilitate the making of decisions fairly, expeditiously, uniformly and with expertise. With respect to the administration of the occupancy and use of the public lands of the United States the need for such goals is particularly appropriate. Congress has mandated the Secretaries of Agriculture and Interior to administer and manage the national forests and parks to ensure utilization in numerous ways that will best meet the needs of the American people. Conservation Code, 16 U. S. C. § 1 et seq. That includes the interests of various multiple users of public lands, as well as those solely interested in conservation of such resources. 16 U. S. C. §§ 475-479, 481-497, 502, 529, 531-538.

Uniformity of decision, consistent with Congressional policy, evolved and adopted by those agencies charged with the administration of public lands is essential. Decisions as to use of such lands may in some cases be virtually irreversible and, thus, must be made with care and by administrators with professional expertise who are familiar with the applicable facts and who possess an understanding of the basic principles governing multiple land use. The economic well being of entire states and regions in this nation are dependent upon certain use of public lands. Economies which are undergirded by use of public land, such as those engaged, for example, in conversion of timber or in cattle grazing, cannot, realistically, have each administrative decision as to land management or use threatened by the substantial delays and uncertainties incident to judicial review. While the public land management decision-making process must be thorough and consideration be given to all relevant factors, such decisions must be reasonably prompt and finality achieved. The administrative agency, generally, is better equipped than the judiciary to accomplish such a result because of its expertise, intimate knowledge of the subject matter, and continuing statutory responsibilities.

These essential advantages of the administrative process can be dissipated, if not destroyed, by unlicensed judicial review by persons or organizations who, though not injured in fact by such decisions, wish to see them tested in the courts. Such an opening of judicial review to any and all parties motivated to see each administrative decision not to their liking judicially tested would effectively shift the decision-making process from the forum of the administrative agency to that of the courtroom.

The price to be paid for such a change of forum includes the problem of diversity of decisions from court to court, caused not only by varying views of the law but also by

varying degrees of expertise. A visible immediate result of such a change would be an increased frequency of delays in the reaching of final decisions on the occupancy and use of public lands and the resources contained thereon. Even where preliminary injunctions are not granted, the fact that administrative decisions are undergoing review and may be reversed, as a practical matter, causes parties as well as non-parties to postpone commitments they would otherwise make. That added hardship of such litigation may, on balance, be acceptable where the complainant claims actual injury. But where judicial review is the result solely of a dedication to abstract principles by a complainant who insists on its right (standing) to test in court each administrative decision not to its liking, the burdens to the agencies and other multiple users of the national natural resource of such review clearly outweigh the advantages to the claimant.

The argument that petitioner does not attempt to represent all interests of the public and that if other groups are affected by the administrative decisions, they too should join in the judicial review is untenable. (Brief for Petitioner, at 28) Joining in judicial review is no answer to many multiple users of public lands to whom time is of the essence, who, by reason of their commitments and the vital interests of employees and communities dependent on their continued operations, must accept present decisions, whether favorable or unfavorable, respecting public land use and occupancy. A timber convertor denied access to timber sales by the Forest Service often, of necessity, must shut down rather than litigate with the timber management agency. An agency decision favorable to that timber convertor, which may permit it to purchase and remove timber, that is judicially reviewed by the petitioner because of its general disagreement with the administrative decision, may, in effect, be just as unfavorable to the timber

convertor and to the employees and communities, and the schools (financed by timber receipts) dependent upon him. The result of what, in effect, is an informal preliminary injunction thus inexpensively obtained by petitioner can destroy the vital interests of communities, schools—indeed of entire states—which are based upon uninterrupted use of public lands, even if the agency decision, in fact, would ultimately be affirmed on the merits.

Thus, a party who opposes in the federal courts an administrative decision, though not injured by it, may effectively reverse that decision by simply imposing the delays of litigation. The federal courts should not be so used to block, at relatively little expense or responsibility to the litigant, carefully made administrative decisions which affect the livelihood and well being of substantial numbers of persons, when no injury is alleged.

Administrative procedures are available for concerned groups, such as petitioner, to voice their objections to certain administrative decisions. Such procedures should be first exhausted before judicial intervention is permitted. See, *Sierra Club* v. *Hardin*, 325 F. Supp. 99, 116, 117 (D. Alaska 1971).[3] Only then should the courts concede standing for complainants who at least allege that they have been

3. The District Court, speaking through Plummer, C. J., stated:

"... The Sierra Club is acquainted with Forest Service protest and administrative review procedures, having previously employed them in cases similar to the one at bar. No satisfactory explanation has been offered for the plaintiffs' failure to file an administrative protest prior to instituting this action on February 10, 1970.

• • • • •

"Plaintiffs have completely ignored established administrative procedures which could have obviated the need for review by this court, or which in the alternative could have provided a meaningful record that would have vastly simplified this proceeding. Their claims, with the exception of the cause of action based upon violations of the National Environmental Policy Act of 1969, are accordingly barred." 325 F. Supp. at 116, 117.

injured. In the present litigation there is no indication that petitioner sought to have the decisions modified administratively.[4]

Judicial review of technical administrative decisions is at best an arduous task.[5] Unrestricted access to the courts by those persons who have not followed available administrative procedures and who do not allege that they in fact have been injured by agency decisions imposes material hardship unnecessarily upon the judiciary.

II. Petitioner Cannot Gain Standing by Asserting Justiciable Rights of Its Members.

Petitioner claims standing to represent the "interests" of its members (Brief for Petitioner at 26-29), yet fails to allege that such interests of its members are any less abstract than its own. It fails to allege, for example, that any of its members is actually a user of the Mineral King Valley who will be denied such use as a result of the Disney project.

But, beyond the absent injury allegation, petitioner cannot claim injury done to its members as a basis for its own standing—any more than in *Tileston* v. *Ullman,* 318 U. S. 44 (1942) a medical doctor could claim standing to obtain an adjudication of his patients' constitutional right to life which they did not assert on their own behalf.

Admittedly, on a few occasions this Court has found special circumstances to justify associations asserting the rights of their members, but only when such organizations are uniquely situated to assert such rights. See, *NAACP* v. *Button,* 371 U. S. 415, 428 (1963); *NAACP* v. *Alabama,*

4. The Department of Agriculture provides detailed appeal procedures from decisions of the Forest Service. 36 C. F. R. §§ 211.20-211.119.

5. See, Kaufman, *Judicial Review of Agency Action: A Judge's Unburdening,* 45 N. Y. U. L. Rev. 201 (1970).

357 U. S. 449, 458-459 (1958). However, this is not a case in which the petitioning organization's members are unable to seek protection in the courts without themselves sacrificing the very right for the protection of which suit was brought. See *NAACP* v. *Alabama, supra,* at 458-459.

Actual users of Mineral King Valley are not prevented in any way from claiming injury and filing their own complaints. If such persons have not been sufficiently interested to voice such opposition, certainly petitioner should not now be allowed standing to litigate, on the claim that it represents the interests of such silent sufferers. Petitioner has shown no needed exception to the fundamental principle that it cannot claim standing on the basis of the allegedly infringed rights of others. Cf. *Alderman* v. *U. S.*, 394 U. S. 165, 174 (1969).

Such a result is consistent also with the framework and finality of class actions procedures. A person injured by an agency decision may be an appropriate party-plaintiff in a class action under Rule 23, F. R. C. P., in which event the Rule 23 tests and requirements would apply to insure that the class is properly constituted and represented. However, such a party-plaintiff must allege an injury in fact to itself which would render it a member of the class it purports to represent. *Bailey* v. *Patterson,* 369 U. S. 31 (1961). Here, petitioner is obviously not a member of a class of persons who have suffered an injury in fact.

Adherence to the class action framework under Rule 23, F. R. C. P., rather than permitting a club to make generalized claims of representing the interests of its members, provides the *res* upon which *res judicata* can operate. Here, however, if petitioner is granted standing, but loses on the merits, there is nothing to prevent relitigation by its members. Despite petitioner's rhetoric, the rights of its members have not been tendered for adjudication. If

Sierra Club members cannot be bound by an adverse decision, petitioner should not be able to assert such rights to claim standing. See, *Alameda Conservation Association* v. *State of California,* 437 F. 2d 1087, 1097-98 (9th Cir., 1971) (concurring opinion, Merrill, *J.*).

III. A New Subjective Criteria for Standing of a Naked "Concern" for the Matters in Issue Should Not Be Substituted for the Objective Criteria of "Injury in Fact".

Unlike many other actions challenging agency action pertaining to the use of public lands, petitioner has here avoided naming as additional parties-plaintiff any persons or local groups allegedly injured by the contested agency action. That apparently deliberate omission raises a material question of whether the basis for standing to sue in the federal courts should now be changed from an allegation of objective "injury" to an allegation of subjective "concern" for the issues.

This Court has recognized that a plaintiff must have the "personal stake and interest that impart the concrete adverseness required by Article III." *Baker* v. *Carr,* 369 U. S. 186, 194 (1962); cited in *Barlow* v. *Collins, supra,* at 164 (1970) and *Flast* v. *Cohen,* 392 U. S. 83, 99 (1967). However, this Court has not been willing to allow such "concrete adverseness" to be developed solely out of motivation to litigate. Something more than an "adversary interest" is necessary to confer standing. *Jenkins* v. *McKeithen,* 395 U. S. 411, 423 (1969). As stated in *Doremus* v. *Board of Education,* 342 U. S. 429, 434, 435 (1951):

> "It is not a question of motivation but of possession of the requisite financial interest that is, or is threatened to be, injured by the unconstitutional conduct."

Admittedly, the requisite interest need not necessarily be financial.[6] But, that interest must consist of more than mere motivation. Undoubtedly, every party who has carried to this Court the question of his standing to sue, as has petitioner, has possessed a high degree of motivation. Yet, motivation alone has not convinced this Court that such parties possessed standing to complain in the federal courts.[7] Professor Davis has observed that.[8]

> "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation."
>
> * * * * *
>
> "Federal law is clear that standing may rest upon a trifle, and *it is equally clear that at least a trifling interest of the plaintiff is always required.*" (Emphasis supplied.)

This, then, is the dividing line between parties entitled to standing and those who are not: Simply, one who has no interest of his own at stake always lacks standing.[9] *Tileston* v. *Ullman, supra,* at 46 (1943).

The prerequisite to standing of injury in fact is simple, objective, and does not result in an injustice where parties are actually in danger of suffering an injury.

If, on the other hand, a sincere "concern" over the

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6. See, *Association of Data Processing Service Organizations* v. *Camp, supra,* at 154.

7. Conversely, the magnitude of the required injury in fact is of little consequence. In *Flast* v. *Cohen,* 392 U. S. 83 (1967), the actual dollars and cents injury was undoubtedly trivial, though the motivation to pursue the litigation in an adversary setting was obviously high as a result of the dispute involved under the Establishment Clause of the First Amendment.

8. See, K. Davis, *Administrative Law Treatise,* §§ 22.09-5 (1970 Supp.).

9. *Id.,* at p. 753.

issues is sufficient to justify standing, what will be the test of proper parties-plaintiff? Adoption of such a basis for standing would replace a well-grounded objective standard with a subjective one. How would a sincere "concern" be tested? How much "concern" would be required? Will two Iowa residents who have never had any personal contact with the Sierra Nevada Mountains, for example, have the same right to standing to protest agency action pertaining thereto as a national conservation organization?[10] If not, what principles should federal courts use in determining whether a plaintiff has standing to sue?

It may be argued that as long as a "public" versus a "private" issue is at stake, the requirement of injury in fact should be modified. Yet, what is a "public" versus a "private" issue? Are all questions pertaining to the use of public lands "public" questions which would permit suit by anyone alleging a sincere "concern" without more? Such obvious difficulties are avoided by adherence to the established principle that injury in fact must be alleged.

If petitioner can gain standing solely on the basis of its "concern" for conservational values, what remains of the limitations on the standing of taxpayers expressed in *Flast* v. *Cohen, supra* (1968)?[11] There, this Court condi-

10. See, Rogers, *The Alice-in-Wonderland World of Standing*, Lewis and Clark Environmental Law, March, 1971; Sussman, *Standing to Challenge Administrative Action: The Concept of Personal Stake*, 39 Geo. Wash. L. Rev. 570 (1971).

11. In *Alameda Conservation Association* v. *State of California, supra* (9th Cir. 1971), the court below found that individual members of a conservation organization owning property either bordering on San Francisco Bay or within six miles of the Bay had standing to sue to halt a salt company from filling the Bay, allegedly to the detriment of fish, wildlife and climate. However, that Court, consistent with its holding below here, held that the Association itself was not entitled to sue simply because of an avowed "concern" for conservation principles, i.e.

"If the Association here had a recreational operation which it conducted and which the defendants interfered with, it could

tioned the standing of the plaintiff-taxpayers upon demonstration of a nexus, *first,* between their status as taxpayers and the type of legislative enactment attacked, and, *second,* between such status and the precise nature of the constitutional infringement alleged. 392 U. S. at 102. Without such a nexus, the plaintiff-taxpayers would be denied standing.

However, if petitioner may now achieve standing by asserting nothing more than a sincere "concern" for conservation principles, may not a taxpayer, objecting to a governmental expenditure which did not meet the *Flast* nexus test, gain standing by merely alleging a sincere "concern" to prevent the alleged unlawful or unconstitutional expenditure of funds for the specific purpose involved? If so, why did *Flast* go to such pains to emphasize the nexus requirements for standing?

IV. Petitioner's Concern for Conservation Principles Does Not, Without More, Bring It Arguably Within Any Statutorily Protected Zone of Interest.

The second test of standing,[12]—whether the complainant's interest sought to be protected is arguably within a statutorily protected "zone of interest"—also has not been satisfied by petitioner.

The Conservation Code, 16 U. S. C. § 1 et seq., was enacted to conserve the natural resources and public land of the United States. Arguably, persons injured in fact by

assert it; if its physical surroundings were made unattractive, this aesthetic infringement would create standing; or if it operated a conservation program, an interference with that operation would establish standing. The point is that the standing necessary to assert as a litigant must be that of the litigant." 437 F. 2d at 1091.

12. See, *Investment Company Institute* v. *Camp, supra,* at 4407 (1971); *Association of Data Processing Service Organizations* v. *Camp, supra,* at 153 (1970).

an agency violation of that Code fall within the "zone of interest" sought to be protected. Thus, persons who allege that they have been deprived of the use of public lands as a result of allegedly unlawful agency action may satisfy the requirements of the "zone of interest" test. In addition, such persons may be granted standing under the Administrative Procedure Act (APA), as persons "aggrieved by agency action within the meaning of a relevant statute." 5 U. S. C. § 702. See, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 39 U. S. L. Week 4287 (U. S. March 2, 1971); *Barlow* v. *Collins, supra*, at 164, 165.

However, petitioner can not point to any provision of the Conservation Code, or APA, or any other relevant statutory or regulatory provision, which indicates that an organization concerned with conservation falls within the "zone of interest" sought to be protected solely because of its "concern" for conservational values. None of the relevant statutory provisions has attempted to afford standing to a complainant who has not suffered an injury in fact.[13]

Similarly, there is no relevant statutory indication that Congress has conferred upon conservation clubs such as petitioner standing as a "private attorneys general" to represent the interests of others who have been aggrieved by the administrative action. Without such a statutory expression, the petitioner should not be accorded such status. See, *Association of Data Processing Service Organizations* v. *Camp, supra*, at 153, n. 1. (1970). See also *F. C. C.* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 476-477 (1940); *Scanwell Laboratories, Inc.* v. *Schaffer*, 424 F.

13. By contrast, the National Environmental Policy Act of 1969, which is not involved here, does require all federal agencies to cooperate with concerned private organizations to further the policies of that Act. Arguably, such a provision may be an attempt to grant standing to litigate. 42 U. S. C. § 4331. See comment, *EDF* v. *Corps of Engineers*, 325 F. Supp. 728, 736 (E. D. Ark. 1971).

2d 859, 864 (D. C. Cir., 1970); *Associated Industries* [illegible] *Ickes,* 134 F. 2d 694, vacated on suggestion of moot[illegible] 320 U. S. 707 (1943).

CONCLUSION.

For the reasons set forth above, the decision of [illegible] United States Court of Appeals for the Ninth Circuit, [illegible] F. 2d 24 (9th Cir. 1970), with respect to its holding th[illegible] the petitioner has no standing as a party-plaintiff in th[illegible] action, should be affirmed.

Respectfully submitted,

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No. 70-34

SIERRA CLUB,

Petitioner,

v.

ROGERS C. B. MORTON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF THE FAR WEST SKI ASSOCIATION AND THE UNITED STATES SKI ASSOCIATION AS AMICI CURIAE

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IN THE SUPREME COURT OF THE UNITED STATES

No. 70-34

SIERRA CLUB,

Petitioner,

v.

ROGERS C. B. MORTON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The Far West Ski Association, a division of the United States Ski Association, and the United States Ski Association respectfully move this Court for leave to file the accompanying brief, Amici Curiae, in this proceeding. The attorneys for the respondents have consented to the filing of this brief, but the attorneys for the petitioner have refused.

The Far West Ski Association, a division of the United States Ski Association is comprised of over 31,000 members living in California, Arizona, Nevada and Hawaii. The United States Ski Association, formed in 1904, is a nationwide organization with over 132,000 members. Both associations are non-profit, volunteer organizations comprised of members

who are keenly interested in recreation and competition skiing. Members of both associations hold responsible positions in Federation Internationale de Ski, the governing body for world-wide amateur ski competition. The United States Ski Association is the sole sponsor for the United States Ski Team, this nation's representative in international amateur ski competition around the world.

The issues presented in this case vitally effect the interests of the members of the Associations. The great majority of important ski areas in the United States depend upon the permit authority of the Secretary of Agriculture which is under attack here. Should the petitioners prevail before this Court and bring into question the authority of the Secretary of Agriculture to authorize ski areas in national forests, the members of the Associations will suffer irreparable harm. Not only will their opportunities for skiing be jeopardized but the United States Ski Association's ability to field the United States Ski Team in the future will be seriously affected to the extent that less ski opportunities are available for the training of future amateur competition skiers.

The Associations have played an active and useful role in this litigation while it was in the lower courts and were granted leave to file a brief amici curiae on the petition for certiorari herein. The Associations do not believe that the issues were adequately presented by the parties below, particularly with respect to the authority of the Secretary of Agriculture, and seek to fully develop the background and legislative history of that authority for the benefit of this Court. The Associations therefore respectfully request leave of this Court to file their annexed brief Amici Curiae in this proceeding.

Respectfully submitted,

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Attorney for Amici Curiae

August, 1971

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE FAR WEST SKI ASSOCIATION AND THE UNITED STATES SKI ASSOCIATION AS AMICI CURIAE

By leave of this Court, the Far West Ski Association, a division of the United States Ski Association, and the United States Ski Association file this brief as Amici Curiae, in conjunction with consideration of this case.

INTERESTS OF AMICI CURIAE

The Far West Ski Association, a division of the United States Ski Association is comprised of over 31,000 members living in California, Arizona, Nevada and Hawaii. The United States Ski Association, formed in 1904, is a nationwide

organization with over 132,000 members. Both Associations are non-profit, volunteer organizations comprised of members who are keenly interested in recreation and competition skiing. Members of the Associations hold responsible positions in Federation Internationale de Ski, the governing body for world-wide amateur ski competition. The United States Ski Association is the sole sponsor for the United States Ski Team, this nation's representative in international amateur ski competition around the world.

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STATEMENT

The Sierra Club filed suit on June 5, 1969, in the United States District Court for the Northern District, California to enjoin the Secretaries of Agriculture and Interior from issuing permits to enable Walt Disney Productions, Inc., to develop a winter sports facility in Mineral King Valley, part of the Sequoia National Forest (A. 3). The Sierra Club's motion for a preliminary injunction was granted on July 23, 1969, upon the contention that irreparable harm would occur to the public interest should the government be allowed to proceed with its plans (A. 186). It was alleged that the Secretary of Agriculture lacked authority to permit the development of a winter sports facility in Mineral King Valley and that the Secretary of the Interior lacked authority to issue

permits to improve an access road to Mineral King which crosses Sequoia National Park and to construct a transmission line to serve Mineral King across Sequoia National Park.

On interlocutory appeal, the United States Court of Appeals for the Ninth Circuit vacated the order granting the preliminary injunction, concluded that the Sierra Club lacked standing to bring suit, and found that the Sierra Club had neither shown with any degree of certainty that it would prevail on the merits nor that it or anyone else would suffer irreparable injury, 433 F.2d 24 (1970) (A. 208). The Sierra Club petitioned this Court for certiorari, which was granted February 22, 1971.

SUMMARY OF ARGUMENT

While Amici Curiae take no position on the issue of whether or not the Sierra Club has standing to bring this action, we would caution the Court to carefully consider the ramifications of its decision. Certainly the standing doctrine has created a barrier inside which the executive branch has carried on its business with very little accountability to the citizens it serves. If this Court expands judicial review of executive branch action by its decision in this case it must be careful at the same time not to create a situation in which the government is no longer able to fulfill its responsibility to effectively manage the nation's resources for the benefit of all citizens. Should the Court find that the Sierra Club has standing to sue, this Court may then properly make final disposition of the issues raised because they involve only questions of the scope of administrative authority which require no trial to resolve.

On the merits, the authority of the Secretary of Agriculture to issue term permits and revocable permits for the development of a winter sports facility at Mineral King Valley in the Sequoia National Forest is challenged. Similar permits have been issued both separately and together in the same manner proposed here for over forty years pursuant to clear legislative authority. Without taking issue with this proposi-

tion, the Sierra Club argues that acreage limitations enacted for term permits somehow create an implied acreage limitation on revocable or combined term-revocable permits. Not only is such an implication contrary to the plain meaning of the statute but it is outside any construction of the histories of legislation authorizing term and revocable permits. Moreover, Congress was aware of the distinction between the two types of authority when it expanded the Secretary of Agriculture's power to issue term permits in 1956 and it was fully informed that ski areas in national forests, then under combined term-revocable permits, covered as much as 400 acres in some instances.

In addition to its claims regarding the Secretary of Agriculture's general permit authority, the Sierra Club erroneously contends that the legislation establishing the Sequoia National Game Refuge further limits the Secretary's authority in this case. The legislation which established the Refuge simply declared the area off limits to hunters and trappers, in part for the safety of the people who have used Mineral King for recreation purposes for over 50 years and it may not be construed to prohibit the development of a winter sports facility at Mineral King.

The Sierra Club also erroneously contends that the Secretary of the Interior lacks power to authorize a transmission line and road improvement in Sequoia National Park, both of which are to serve Mineral King. The prohibition against transmission lines in Sequoia National Park relied upon by the Sierra Club is in fact only a prohibition against hydroelectric development, analogous to similar prohibitions contained in legislation establishing or expanding 15 other national parks and in no way restricts the authority of the Secretary to permit construction of the transmission line proposed here. The "prohibition" against roads in national parks, relied upon by the Sierra Club, is likewise not a prohibition against what is proposed in this case. Here an existing road would only be improved. The improvement has been found to be appropriate in the judgment of the Secre-

tary of the Interior after detailed study and consideration and is entirely within the power of the Secretary to authorize.

Essentially, we have here a case where the executive branch has been empowered to exercise broad discretion in the management of the nation's natural resources. The substance of the claims raised here by the Sierra Club amounts to a disagreement with the exercise of that discretion to develop the winter recreation potential of Mineral King. The issue for this Court, however, is not whether the Sierra Club or anyone else believes Mineral King should be developed as a winter sports facility, but whether the Secretaries of Agriculture and the Interior are empowered to authorize such a facility at Mineral King. The statutes relied upon grant that power and no other statute pointed to limits the authority to be exercised here. Thus, the Court is compelled to dismiss the Sierra Club's claim and affirm the Ninth Circuit.

ARGUMENT

I

THE ISSUE OF STANDING MUST BE APPROACHED WITH CAUTION AND WITH A VIEW TO THE FAR REACHING RAMIFICATIONS OF THE COURT'S DECISION IN THIS CASE

Amici Curiae take no position on the question of the Sierra Club's standing to sue. However, we cannot fail to take note of the extensive discussion standing has received in this case to date. Accordingly, we offer the following comments for the benefit of the Court in its deliberations.

The concept of standing to sue was born in an era where the ambit of governmental activity was, by the nature of things, more limited than it is today. In those early days most individuals had little time for concern with governmental activities which today engage the attention and energy of so many. This is especially true in the field of natural resources.

The growth of the concept of standing left behind it an intricate path of legal history from the early days of *Massachusetts v. Mellon*[1], through *Tennessee Electric Power Co. v. T.V.A.*[2], *Poe v. Ullman*[3], *Baker v. Carr*[4], *Flast v. Cohen*[5], and *Association of Data Processing Service Organizations, Inc. v. Camp*[6], to *Citizens to Preserve Overton Park v. Volpe*[7]. Looking back over this path it is apparent that in many instances the result of the standing doctrine has been to erect barriers around governmental activity to the point where many patriotic citizens candidly ask if there is anyone who can challenge the government for an accounting. Perhaps the Court will conclude that in this case there is someone who can demand that accounting.

In finding a solution to this dilemma, though, Amici Curiae earnestly caution against creating a situation where not only is the government held to an accounting but where the government will be besieged in the future by those who would substitute their judgment for the government's judgment to the point where it can no longer fulfill its responsibilities to its citizens.

This word of caution is particularly relevant to questions involving the management of the nations' natural resources. Policy must be established and honored by administrators but legislated policy is only a starting point. Administrators must face the hard questions of natural resource management and reconcile often competing interests within the legal authority granted them. Those who would oppose a particular land use decision must be heard but the government

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[1]262 U.S. 447 (1923).

[2]306 U.S. 118 (1939).

[3]367 U.S. 497 (1961).

[4]369 U.S. 186 (1962).

[5]392 U.S. 83 (1968).

[6]397 U.S. 150 (1970).

[7]39 U.S.L.W. 4287 (U.S. March 2, 1971).

must also be allowed to implement its decision in a reasonably expeditious manner. The barrier termed "standing to sue" which has been erected around governmental activity, if removed, must be removed in such a manner that the government can continue to fulfill its responsibility to manage the nation's resources. Administrators must be held to act within the scope of authority provided them, but likewise, actions which they take within that scope of authority must not be subjected to protracted litigation for the sole purpose of forcing "another look" at the decision already reached.

This law suit was filed more than two years ago. At least another six months will elapse before a decision can be expected and at that point the case will not even have gone to trial. Some attention must be paid by this Court in reaching its decision to the future vitality of administrative decision making. The Court must avoid the pitfall of establishing a legal principal which would cripple the government as a whole by over involving the judicial branch in the activities of the executive branch.

II

THIS COURT IS THE PROPER FORUM FOR FINAL DISPOSITION OF THE ISSUES IN THIS CASE

Very recently this Court definitively addressed the problems associated with judicial review of the merits of cases where administrative action is challenged. *Citizens to Preserve Overton Park v. Volpe*, supra. In that case the Court decided that grave questions had been raised about the propriety of administrative action and articulated important guidelines to be followed by the judiciary in reviewing administrative action.

The Court held that the Administrative Procedure Act generally guarantees judicial review of administrative action. As for the exception to judicial review in instances where "agency action is committed to agency discretion by law," 5 U.S.C. 701 (Supp. V), the Court found it to be "a very

narrow exception."[8] The Court stated that where there is law to apply, the agency discretion exception to judicial review is inapplicable.

Where review is appropriate, the Court next addressed the problem of the standard of review to be used. In certain narrow, limited situations involving rule makings or adjudicatory hearings, a substantial evidence test is to be used. 5 U.S.C. 706(2)(E)(Supp. V). In other equally narrow situations involving inadequate fact finding procedures in adjudicatory hearings or where new issues are raised in enforcing a nonadjudicatory agency action, a *de novo* review is authorized. 5 U.S.C. 706(2)(F)(Supp. V). But where neither of these situations exists (as in the instant case), the Court announced the general rule that 5 U.S.C. 706 (Supp. V) "requires the reviewing court to engage in a substantial inquiry," while at the same time according the administrative agency's decision a presumption of regularity.[9]

The key question which then faced the Court was *how* this substantial inquiry may be accomplished. In *Overton Park* the Court had before it a situation where the administrative agency was required by statute[10] to engage in an extensive hearing and fact finding process prior to reaching a decision. Detailed statutory criteria existed by which the appropriateness of the administrator's judgment could be measured by the reviewing judicial authority. Thus, the Court decided that under those circumstances the case should be remanded for the further consideration of the trial court.

A full blown trial on the merits is not, however, the only method of conducting the substantial inquiry required by 16 U.S.C. 706. In articulating the substantial inquiry test in *Overton Park* the Court relied upon two of its earlier decisions. One of those cases, *Pacific States Box and Basket Co. v. White*, 296 U.S. 176 (1935), involved no more trial court

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[8] 39 U.S.L.W. 4287, 4290.

[9] *Ibid.*, at 4291.

[10] 49 U.S.C. 1653 (Supp. V); 23 U.S.C. 138 (Supp. V).

action than has been accorded this case to date, yet that case was fully disposed of by this Court. There the Court affirmed an order of the District Court dismissing plaintiff's motion for a preliminary injunction on the grounds that the complaint did not state sufficient facts to entitle the plaintiff to relief. The case was disposed of without trial by this Court.

The conclusion to be reached is that not all challenges to administrative action must reach the trial stage. In *Overton Park* a trial was necessary because the judgment of the administrator was at issue and detailed statutory criteria existed whereby the Court could measure his performance. In *Pacific States* where the substance of the claim was whether the administrator acted constitutionally and within the scope of his authority, no trial was ordered. Likewise here, where the substance of the claim made by the Sierra Club in its complaint is that the administrators acted beyond the scope of their authority and where this Court need not engage in an inquiry into the subjective judgments reached by the administrators to rule on the validity of the Sierra Club's claim, no trial is necessary and this Court is competent to dispose of all claims.

Amici Curiae have therefore set out to describe in detail the actual scope of statutory authority granted the administrators which the Sierra Club alleges they have exceeded. Amici Curiae submit that from the statutes alone, when put in the proper perspective by their legislative history, the clear limits of the administrative authority may be determined and the legality of the acts complained of by the Sierra Club may be judged. In each instance in this case the administrators possess the authority which has been challenged. It goes without saying that the Sierra Club would have exercised that authority differently were it the administrator. The question for this Court, however, is not which decision the administrator reached, but whether he had the authority to reach a decision. If so, this Court must affirm the Court of Appeals order vacating the injunction and order the District Court to dismiss the complaint.

III

THE SECRETARY OF AGRICULTURE HAS AUTHORITY TO PERMIT THE DEVELOPMENT OF A WINTER SPORTS FACILITY ON NATIONAL FOREST LAND

The Constitution vests general power over federal land in the legislative branch. Article IV, Section 3 declares that, "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . ." According to this Court, the scope of that authority is unlimited.

> "With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. *That power is subject to no limitation.*" (*Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871). (Emphasis added).

The Mineral King winter sports facility, to be developed by private persons, is proposed to be located on federal land within the Sequoia National Forest. Mineral King depends upon whether or not Congress has empowered the executive branch to permit such a development on federal land. Specifically at issue is the Secretary of Agriculture's authority to issue two permits—a term permit and a revocable permit—which would authorize private persons to occupy and develop the Forest Service land. The authority under attack here has been widely used by the Secretary of Agriculture to permit construction of 84 other winter sports facilities. A list of those areas is contained in Appendix B to this brief.

A. The Revocable Permit

Congress originally delegated its power to manage the national forests to the Secretary of the Interior by passing the Organic Administration Act of June 4, 1897, 30 Stat. 35. The Act provided that the Secretary, in addition to protecting national forest reservations from harm by fire or other causes, ". . . may make such rules and regulations and establish such service as will insure the objects of such

reservations, namely, to regulate their occupancy and use to preserve the forests thereon from destruction." This regulatory power was transferred to the Secretary of Agriculture in 1905, 33 Stat. 628, and still serves today as the source of much of the Secretary of Agriculture's authority to manage national forests, including his broad authority to issue revocable use and occupancy permits. 16 U.S.C. 551.

As early as 1911 the Secretary's authority to issue revocable permits was challenged. *United States v. Grimaud*, 220 U.S. 506 (1911). This Court, in upholding the Secretary's authority to issue revocable permits, stated that the terms and conditions of the permit requirements then under attack were matters of administrative detail and found that, "in the nature of things it was impracticable for Congress to provide general regulations for these various and varying details of management." 220 U.S. 506 at 516.

The Attorney General commented on the significance of the Secretary's power to issue revocable permits in 1914 and noted the reliance that even then was place in them.

> "During the nine years last passed the Secretary of Agriculture has assumed and executed the task of regulating the use and occupation of the forest, pursuant to the Act of 1897, *supra*, and therein has promulgated and from time to time revised elaborate rules and regulations, and issued and reissued innumerable permits for grazing (*United States v. Grimaud*, 220 U.S. 506, 522; *Light v. United States*, *id.* 523), and for other particular uses, which involve the occupation or usufructuary enjoyment of designated areas by the beneficiaries, to the exclusion of other persons. In like manner he has made his regulations under the act of 1901, and has issued in large numbers the revocable licenses therein authorized. Important enterprises have been founded upon the faith of such licenses. *Millions of dollars have been expended in the construction of various kinds of plants in reliance upon the authority of the Secretary of Agriculture to permit their erection and*

operation within the forest reservations." (30 Op. Atty. Gen. 263, 268-269 (1914) (Emphasis added).

Thus, at a very early stage in the Secretary of Agriculture's exercise of his responsibility to administer and manage national forest lands (and prior to his possession of any authority to grant term permits), his discretionary authority to issue revocable use and occupancy permits was sanctioned and construed broadly by this Court. Many revocable permits had been issued based upon that authority and substantial investments had been made in reliance thereon. Nothing has occurred since these early days to deprive him of his authority. The Secretary may, therefore, in this case issue the revocable permit and the fact that persons rely on that permit and construct facilities pursuant thereto is nothing novel.

B. The Term Permit

By 1913, it became evident that facilities requiring substantial capital investment would have to be constructed if people were to enjoy any but the most primitive recreation uses of forest land. Whether airport hangars and runways or resort hotels, these capital improvements required long term financing which in turn required the borrower to possess some fixed interest in the land upon which the facilities would be constructed. To meet this need, Congress conferred upon the Secretary of Agriculture the power to issue "term" permits guaranteeing the permittee secure tenure over a fixed parcel of land for a term of years. The legislative history of the Secretary's term permit authority, detailed below, demonstrates that his authority to issue term permits is separate from and in addition to his authority to issue revocable permits. The sole purpose of the term permit was to cure the problem of inadequate land tenure necessary for long term financing of privately constructed improvements on Forest Service land. The enactment of the term permit authority, with its acreage limitation, in no way circumscribed the authority of the Secretary to issue revocable permits.

The Secretary of Agriculture first requested authority to grant secured tenure to national forest land in 1913 in conjunction with this appropriation request for fiscal year 1915. The 1913 proposed legislation would have given the Secretary general rental and lease power ". . .for the purpose of increasing the public benefits or public use of national forests" without limitation on size of parcel or length of term. Henry S. Graves, Chief Forester, first explained the purpose of the 1913 proposed legislation to the House Committee on Agriculture on December 12, 1913 as follows:[11]

> "MR. GRAVES. The purpose of [the proposed legislation] is to enable the Secretary of Agriculture to issue term permits for the use of national forest land, where there are considerable investments involved, which the ordinary investor is unwilling to make on the basis of a revocable permit. The most conspicious example is the erection of summer hotels. There is no authority at the present time, except in the case of mineral springs, to grant a term permit for the use of land for the erection of hotels. In the case of mineral springs, we have a special act which recognizes this situation and gives authority to grant a term permit for not to exceed 20 years. We have constantly applications for the erection of hotels near lakes and in places of unusual scenic beauty, but a revocable permit does not give a sufficient security to a man to invest the amount of money which would be ordinarily required.
>
> "MR. McLAUGHLIN. Do you propose to give here a revocable permit that is a gift, or a sale?
>
> "MR. GRAVES. I think there should be language in here which would restrict the length of time; say, for a period not to exceed 20 or 30 or 40 years, as may seem desirable. There is authority in the case of national parks to grant permits for not to exceed 20 years for the erection of hotels."

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[11] *Hearings on H.R. 13679 before the House Committee on Agriculture and Report on the Bill,* 63rd Cong., 2nd Sess., at 302-303 (1914).

The bill, when finally reported by the House Agriculture Committee, included term permit authority[12] for periods up to 20 years but without any acreage limitation. The Committee's Report adopted the rationale of the Forest Service that the additional authority was necessary for permittees to acquire financing for capital facilities. The Report states:[13]

> "*Rent or lease of land within national forests* (page 39, line 22).—This is a new paragraph. Under existing law the Secretary of Agriculture is authorized to permit the occupancy of national forest land for any use not inconsistent with the purposes for which the forests are created, but the permission to occupy such land may be terminated at any time in the discretion of the Secretary. Such permits are sufficient to meet the public needs when the use of land does not involve expenditures of any considerable sum of money in the erection of buildings or other improvements on the land. When, however, the use of the land necessitates the investment of considerable sums, as for example, in the erection of hotels, stores, and other business structures or summer residences, other buildings for recreation, the revocable permit offers a serious difficulty, which can be readily overcome by extending the authority of the Secretary to the granting of leases for definite periods. The adoption of this paragraph will increase the public benefits and public uses of the national forests."

The 1913 proposed legislation was deleted from the appropriation bill in floor debate in both Houses on points of order.[14] The acreage limitation was considered, however, in the Senate during debate on the bill prior to it being killed. It is clear from this debate that the acreage limitation was meant to apply only to the term permit authority and was

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[12]H.R. 13679, 63rd Cong., 2nd Sess., 51 Cong. Rec. 4771-2 (1914).

[13]H. Rep. No. 295, 63rd Cong., 2nd Sess. (*supra*, note 11), at 692.

[14]House, 51 Cong. Rec. 4771-2 (1914); Senate 51 Cong. Rec. 9101 (1914).

not introduced to place any limitation on any other powers of the Secretary of Agriculture.[15]

"MR. CLARK of Wyoming. What Senator offers the amendment. [i.e. the 1913 legislation granting term permit authority].

"The VICE PRESIDENT. The Senator from Washington [Mr. Jones].

"MR. JONES. I will simply say that this is a provision that was in the bill when it was reported to the House from the Agricultural Committee. It went out on a point of order. The sole purpose of it is substantially this: In many of the forest reserves there are what may be termed 'camps,' summer sites, that could be leased and would be leased if the Secretary of Agriculture had authority to do it for a reasonable time, and houses put up and looked after. The purpose of this amendment is simply to give the Secretary of Agriculture authority, on petition from proper persons, to make such leases as he may deem advisable.

* * * * *

"MR. GALLINGER. Mr. President, I notice that in the amendment there is no condition as to the amount of land that may be leased to these people. I suppose the Department of Agriculture might let them have a hundred acres or 50 acres or any other amount.

"MR. JONES. That is true, and that had occurred to me, and I spoke about it to one of the Members of the House who was especially interested in the matter. I should have no objection myself to limiting the amount. I have offered the amendment just as it was reported by the Agricultural Committee of the House.

"MR. GALLINGER. What amount would the Senator suggest?

"MR. JONES. I should say 10 acres.

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[15] 51 Cong. Rec. 9101 (1914).

"MR. GALLINGER. I will offer that amendment to the amendment, '*Provided*, That the amount shall not exceed 10 acres.'

"MR. SMITH of Georgia. Mr. President, what is the matter that is pending in the shape of a proposed amendment?

"MR. JONES. I ask that the amendment may be read.

"MR. SMITH of Georgia. Yes; I should like to have it read.

"The VICE PRESIDENT. The Secretary will state the amendment.

"The SECRETARY. The Senator from Washington [Mr. JONES] proposes the following amendment, to be inserted on page 40, after line 5:

> That hereafter the Secretary of Agriculture may, when necessary for the purpose of increasing the public benefits or public use of the national forests, rent or lease to responsible persons or corporations, for periods of not to exceed 20 years, suitable spaces or portions of ground for the construction of summer residences, hotels, stores, or any structures needed for recreation or convenience.

The amendment suggested by the senior Senator from New Hampshire [Mr. GALLINGER] is, on line 4, after the word 'corporations,' to insert 'not to exceed 10 acres,' so as to read:

Rent or lease to responsible persons or corporations not to exceed 10 acres—

And so forth."

The following year, in December of 1914, the House Agriculture Committee again recommended that the Secretary of Agriculture be granted authority to issue term permits in its report on the agriculture appropriation bill for fiscal year 1916.[16] This time the legislation passed and the Secretary was granted authority to issue term permits to construct

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[16]H. Rep. No. 1255, 63rd Cong., 3rd Sess., *Hearings on H.R. 20415 before the House Committee on Agriculture and Report on the Bill*, 255 at 268 (1914).

facilities for public convenience and recreation purposes on up to 5 acres for up to 30 years.[17]

Three unsuccessful attempts to increase the acreage limitation were made between the passage of the original term permit bill in 1915 and 1956 when the acreage limitation was finally raised from 5 to 80 acres. They are described here to demonstrate the fact that Congress was fully informed of the practice of combining term and revocable permits and that the term permit area limitation was never intended to limit the Secretary's power to issue revocable permits.

Between 1917 and 1929 the annual number of visitors to national forests rose from 3,160,000 to 31,758,231.[18] By 1929, 34,195 term and revocable permits were in effect and an unsuccessful effort was made during the 1930's by the Department of Agriculture to increase the term permit acreage limitation and broaden the purposes for which term permits could be issued.[19] In 1931, the Department justified their request for the expanded authority by stating:[20]

> "Experience has proved that 5 acres is insufficient to permit of the proper development of the most modern types of outdoor camps, hotels, resorts, sanitoria, etc. which, in addition to the principal structures, usually require the related use of lands for the various necessary utilities, recreational services, etc. now regarded as essential to such establishments. At present these are provided by the issuance of supplemental terminal permits, which injects an undesirable element of uncertainty of tenure and adds to routine requirements of administration."

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[17] 38 Stat. 1101.

[18] *Hearings before the House Committee on Agriculture, January 26, 27, 28 and February 5, 6, 1931,* 71st Cong., 3rd Sess., Serial V at 63.

[19] H.R. 11637 and S. 4166, 71st Cong., 2nd Sess. (1930); H.R. 16336, S. 5604 and S. 5810, 71st Cong., 3rd Sess. (1931); S. 773, 72nd Cong., 1st Sess. (1931); H.R. 58 and S. 872, 73rd Cong., 1st Sess. (1933); H.R. 6034 and S. 463, 74th Cong., 1st Sess. (1935); and S. 1054, 75th Cong., 1st Sess. (1937).

[20] *Hearings, supra,* note 18, at 62.

Security of tenure, which motivated Congress to pass the original term permit authority, again motivated these attempts to expand the Secretary's power. Data submitted to the Committee to establish the need for the legislation showed that while most permittees would require substantially less than the 80 acres included in the proposed legislation, *many forest uses exceeded the then existing 5* acre term permit limitation and would exceed even the proposed *80* acre term permit limitation were it enacted. (Note that by merely dividing the acreage listed in the Forest Service table by the number of permits, it could be seen that some permits exceeded 400 acres.)

SPECIAL-USE PERMITS IN FORCE
DECEMBER 31, 1929[21]

Permit Purposes	*No.*	*Acres*	*Approx. Average Permit Acreage*[22]
Agriculture & Cultivation	1,198	22,229	19
Airplane Landing, beacons and hangars	15	2,460	164
Distillation Plant	1	120	120
Experimental and Demonstration Area	6	2,468	411
Fish or Fruit Cannery	47	466	10
Fish Hatchery, etc.	106	4,029	38
Fur Farm	224	148,557	663
Hotel and Roadhouse	49	524	11
Mill and Factory Site	29	622	21
Nursery	5	1,102	220
Park	19	9,376	493
Pasture	5,828	1,268,507	218
Playground	20	791	40
Quarry	22	653	30
Reservoir	1,073	111,500	110
Resort and Clubhouse	807	7,604	9
Turpentine or Oil Extracting Still	1	20	20
Watershed	43	338,167	7,864

[21] *Ibid.*, 64.

[22] Derived by dividing total number of permits into total acreage under permit and rounded to nearest whole acre. Computations made by Amici Curiae.

Thus, while new term permit legislation was being sought to increase the amount of acreage covered by any one term permit to 80 acres, there was no suggestion whatsoever that any new term permit authority alone would adequately fulfill the needs for use of forest lands then filled by revocable permits or combined revocable–term permits or that revocable permits for 400, 600, or even 6,000 acre tracts would no longer be valid or issued.

While no legislation was ever enacted during the 1930's, forest usage continued to grow and when legislation was again considered in 1947 to expand the Secretary of Agriculture's authority to issue term permits, some 40,000 term and revocable permits existed.[23] Testifying before a House Agriculture Committee Subcommittee, the Assistant Chief of the Forest Service again informed the Congress that realities of modern forest usage compelled the Forest Service to follow the practice of combining term and revocable permits for areas which "greatly exceed" the 5 acre limit on term permits. He also stated that legislation expanding the term permit authority was necessary to provide the stability to land tenure necessary to adequately finance further development.[24] While the 1947 bill, as introduced, would have applied to all Forest Service lands, the version which finally passed was limited to Alaskan lands only.[25]

Legislation was again introduced in 1953 to remedy the problem of lack of executive authority to provide secure tenure over sufficiently large parcels of national forest land to attract investors and enable them to finance modern recreational developments.[26] The 1953 bill passed the House but was never reported out of the Senate Committee on Agriculture and Forestry.

[23] *Hearings on H.R. 1809 before Subcommittee No. 2 of the House Committee on Agriculture,* 80th Cong., 1st Sess., at 2 (1947).

[24] *Ibid.*, 2-3.

[25] 62 Stat. 100, 48 U.S.C.A. 341.

[26] H.R. 2762, 83rd Cong., 1st Sess. (1953); H. Rep. No. 1742, 83rd Cong., 2nd Sess. (1954).

Legislation to expand the 1915 five acre term permit authority finally passed the Congress in 1956, 70 Stat. 708, and is now contained in 16 U.S.C. 497. In reporting on the 1956 bill[27] both the House Committee on Agriculture and the Senate Committee on Agriculture and Forestry were careful not to confuse authority for term and revocable permits. They set forth the distinction between the two authorities, carefully employing the word "such" to relate the 80 acre limitation only to the term permit authority:[28]

> "The Department of Agriculture now has adequate authority to issue revocable permits for all purposes under the act of June 4, 1897 (16 U.S.C. 551). Its authority to issue term permits, and the extent to which *such* authority would be broadened by S. 2216, are shown below: [a table followed]." (Emphasis added)

The day after passage of the 1956 bill by the Senate, Edward Crafts, Assistant Chief of the Forest Service appeared before the House Agriculture Committee to explain the bill and the prevailing practice of the Forest Service with respect to term and revocable permits. The relevant passages are set forth in full to avoid any misinterpretation.[29]

> "Mr. Crafts. Mr. Chairman, we have authority now under the National Forests to give revocable one year permits for any use for any acreage.
>
> "We have certain term authority at the present time.
>
> "We can at the present time give thirty year permits to hotels, and resorts, for five acres. We can also give it to summer homes and stores for thirty years, for five acres.
>
> "We do not have any authority to give term permits for industrial or commercial purposes. What this bill

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[27] S. 2216, 84th Cong., 1st Sess. (1955).

[28] H. Rep. No. 2792; S. Rep. No. 2511, 84th Cong., 2nd Sess. (1956).

[29] *Hearing on General Committee Business before the House Committee on Agriculture*, Vol. 1, July 17, 1956, Harold D. Cooley, Chairman, Presiding. Transcript p. 43-44 (unprinted).

would do would extend the authority for hotels and resorts and facilities for recreational purposes, and let us give permits for eighty acres for thirty years whereas now we can give five acres for thirty years.

"When this committee considered the bill last year, you amended the bill with respect to summer homes and stores, to not expand the acreage from existing authority. That was the change that the committee made in the bill.

"So as the bill now stands, we would have the same authority as we have at the present time which is five acres for thirty years for summer homes and stores. It would give us authority for eighty acres for thirty years for facilities for industrial or commercial purposes, provided the purposes were not inconsistent with the purposes for which the National Forests were established.

"That is what the bill would do."

In response to a question from Representative August H. Andresen regarding an apparent conflict of policy between the 1956 bill generally and its application to Superior National Forest, Mr. Crafts answered:[30]

"That is correct. Mr. Andresen, of course, the Superior bill is a very special situation. We have no parallel situation to that any place else in the National Forest system. It is an unprecedented and unique situation on Superior.

"You are quite correct, that the policy that we are following through the purchase of these resort areas and to make that area a complete wilderness and a new country, is contrary to the general authority which we would have in this bill for non-wilderness areas in the National Forests.

"We have many, many permits for summer homes, stores, resorts, hotels, all sorts of special uses. I have a list of them here, the type of things which average more than five acres.

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[30] *Ibid.*, Transcript p. 44-45.

> "*We have camp and picnic areas, with 17 acres. Those are summer camps. We have many permits for boy-scout camps and girlscout camps. Fish hatcheries, 36 acres; fur farms, 78; mill and factory sites, 48 acres; nurseries, 68; parks and playgrounds, 88 acres; reservoirs, 75 acres; rifle and target ranges, 400 acres; winter sports areas, 400 acres.*
>
> "None of those can we handle on a term permit basis under the existing authority. One reason the term permit is needed is because people who want these permits, want to develop these areas, have difficulty frequently in getting financing from the banks, and getting loans to develop these facilities if they can show that they only have tenure for one year." (Emphasis added)

Thus, the Forest Service again apprised the Committee of its continued practice of linking term and revocable permits where appropriate, even where the total area under such permits might exceed the maximum permissable *term* permit acreage, whether it be 5 acres or 80 acres. In addition, winter sports areas were specifically identified as a type of facility which required large amounts of land and which, *at that time*, ranged to 400 acres in total area. In summary, the purpose of the 1956 legislation, now 16 U.S.C. 497, was not to limit the total area subject to use and occupancy but to expand the areas subject to secure tenure to enhance the prospects of financing the development of the total area.

The situation today conforms to the administrative practices followed by the Secretary of Agriculture for over 40 years. 84 ski areas (listed in Brief Appendix B) exist under permits which are substantially the same as those challenged by the Sierra Club here. Seventy-seven of those ski areas would be essentially "ultra vires" were this Court to strike down the Secretary's authority to issue term and revocable permits as challenged by the Sierra Club.[31] These areas have not sprung up over night but have developed over a

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[31] *Hearings on H.R. 9417 before the Senate Appropriations Committee, Subcommittee on Interior and Related Agencies*, 92nd Cong., 2nd Sess., at 2922 (page proof version) (1971).

number of years in reliance upon the Secretary's authority as described above. In fact, two ski resorts exist on land under revocable permit only. These are Mount Snow in Green Mountain National Forest (911 acres), New Hampshire and Multipor Ski Bowl in Mount Hood National Forest, Oregon (640 acres).

C. Conclusion

The conclusions to be drawn from this review of the development of the term and revocable permit authority as it relates to the Secretary of Agriculture and his management of national forest lands are few and undisputed:

First:

There can be no doubt of the purpose of the term permit authority. It exists for the benefit of those who would construct costly facilities on land owned by the federal government and who must be assured of some security of tenure over a sufficient amount of land before they can prudently undertake their investment. There is not one shred of evidence either by the terms of 16 U.S.C. 497 or in any corner of its long legislative history to suggest that it was enacted, as alleged by the Sierra Club, to limit any other permit authority possessed by the Secretary of Agriculture. To the contrary, 16 U.S.C. 497 expands the Secretary's authority and he has properly utilized this authority in this case and in 84 other cases set forth in Appendix B to this Brief.

Second:

There can be no doubt about the fact that Congress has been fully informed since 1931 of the Secretary of Agriculture's practice of linking term and revocable permits for use and occupancy of the national forests. In fact, in conjunction with enactment of the 1956 legislation, 16 U.S.C. 497, Congress was told that ski areas then under permit ranged as high as 400 acres as shown by Mr. Craft's testimony before the House Agriculture Committee. We submit that under any construction of the doctrine of legislative branch

ratification of executive branch action, Congress must be deemed here to have concurred in the linking of term and revocable permits. *Wells v. Nickles*, 104 U.S. (14 Ott) 444 (1882); *Brooks v. Dewar*, 313 U.S. 354, 361 (1941); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 735-736 (1950).

Third:

There can be no doubt about the fact that revocable permits, issued under the authority of 16 U.S.C. 551 are truly revocable. Speculation about whether or not the Forest Service would at some future date withdraw permission from the permittees to use certain lands in Mineral King Valley after they made certain investments is immaterial. The case books are too full of complaints by those disenfranchised from federal lands held under revocable permits for the Sierra Club to seriously claim that revocable permits are not really revocable and hence *ultra vires*. In fact, the very existence of term permit and easement authority today is a testimony to the insecurity of lands held under a revocable permit authority.

IV.

THE SECRETARY OF AGRICULTURE'S AUTHORITY TO PERMIT THE DEVELOPMENT OF A WINTER SPORTS FACILITY IN MINERAL KING VALLEY IS NOT CIRCUMSCRIBED BY LAW

Having once concluded that the Secretary of Agriculture possesses sufficient authority to issue term and revocable permits for the development of winter sports facilities in Mineral King Valley, consideration must be given to whether his authority is circumscribed or limited in any manner. The Secretary's authority is limited in this case only in so far as it may be affected by establishment of the Sequoia National Game Refuge in 1926, 16 U.S.C. 688. Section 688 provides that certain lands including Mineral King Valley:[32]

[32] Full text appears in Brief Appendix A.

> "... are designated as the Sequoia National Game Refuge, and the hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of the United States within the limits of the said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture: *Provided*, That it is the purpose of this section to protect from trespass the public lands of the United States and the game animals which may be thereon, and not to interfere with the operation of the local game laws as affecting private or State lands: *Provided further*, That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established."

It is evident by the terms of this statute that the game refuge was established for the protection of animals but the inquiry must go further if any useful limits on the Secretary's authority are to be derived. Animals may be protected in a variety of ways including placing them in a zoo or creating an absolute wilderness preserve free of all people. In creating the Sequoia Game Refuge, Congress chose neither to cage the animals nor to enjoin people from enjoying them but rather to prevent people from "hunting, trapping, killing or capturing" them. This method of protection was uniquely tailored to the environs of Mineral King Valley because the safety of not only the animals but also those people already utilizing Mineral King for recreation purposes was at stake. This was made clear by William B. Greeley, Chief Forester, in testimony before the House Committee on Public Lands when legislation to create the game refuge was first considered in 1924:[33]

[33] *Hearings on H.R. 4095 before the House Committee on the Public Lands*, 68th Cong., 1st Sess., at 23-24 (1924).

"The Mineral King area has been left out of the proposed park, primarily because it is a mineralized section. There is a certain amount of mining activity still going on, and those people feel that they have mineral values there which they should be free to prospect for and develop. Since that is not consistent with national park administration, it seems to be the best solution to leave that territory out. It does leave rather a peculiar peninsula in the boundary line, but there will be no very serious difficulty involved in administration.

"There is one feature of the bill which the Forest Service has asked Mr. Barbour to include and which he has included, and that is the creation of a Federal game preserve to cover this peninsula. The land contained in the purple line, now having national park status, is at present under absolute game protection. This much of what is now a game preserve would be thrown out if a boundary change is made. We believe that it is desirable to continue the game protection over this little strip of territory that has had it in the past, and also to extend the game preserve to cover the entire peninsula, for three reasons: In the first place, an enlargement of the game preserve in principle will, we believe, be a good thing as a breeding ground and source of replenishment for the big hunting territory to the south—and I can assure you that the huntsmen of that region will have ample ground for their sport in the Sequoia National Forest, which covers over 2,000,000 acres to the south of this territory. The intent is to enlarge the game preserve within reasonable limits and increase the supply of valuable game animals in that territory.

"Mr. Thomas. What kind of game is found there?

"Mr. Greeley. Very largely California deer. Furthermore, you can readily see that with hunting prohibited within the park boundary around this peninsula, it would be very difficult, if hunting were permitted in the peninsula, to prevent poaching across the park boundaries to the east and west. So, as a practical administrative matter, the proposition will

> be very much simplified if that can be thrown into a game preserve. *The third reason is that in the vicinity of Mineral King is quite an intensely developed recreational area under national forest administration. There are a good many campers in there. There are a good many summer home permits held by people who have constructed summer cabins and who take their families up there for the entire season, and on account of that intensive recreational development we think it is preferable to exclude hunting from the region.*" (Emphasis added.)

Section 688, creating the game refuge, by its terms delegates the management of the game refuge to the discretion of the Secretary of Agriculture. The Secretary has continuously recognized the long standing recreation uses of Mineral King Valley which Col. Greeley identified as existing even prior to 1924. He has sought to exercise his authority through the years in a manner consistent with Section 688 which certainly never contemplated management of the area for any one single purpose.

That this is in fact the case is demonstrated by Secretary Brannan's determination in 1949 that Mineral King was an area which should be managed for public recreation requiring development and substantial improvement pursuant to 36 CFR 251.22.[34] In so designating Mineral King, the Secretary found that recreation was not inconsistent with the Sequoia

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[34]Designation contained on U.S. Forest Service Map entitled "Mineral King Recreation Area, Sequoia National Forest, T. 17S., R 31 E., Mt. Diablo Base and Meridian" and containing the following statement:

> "By virtue of the authority vested in me as Secretary of Agriculture by the Act of June 4, 1897 (30 Stat. 35) and the Act of February 1, 1905 (30 Stat. 628), and in accordance with Regulation U-3(b) (Sec. 251.22, Chapter II, Title 36 C.F.R.) of this Department this area, as shown by this map and legal description, is classified as the Mineral King Recreation Area, and is hereby set apart and reserved for public recreation use and closed to all other occupancy and use except such uses as the Regional Forester May Authorize as being consistent with recreation use. Dated May 13, 1949."

National Game Refuge. Moreover, it should be noted that the objectives of the game preserve have not been achieved by simply building a fence around Mineral King and excluding the outside world. For example, to meet a problem of overpopulation of the deer herd in the area, the Forest Service found it necessary to enter into a "Memorandum of Understanding with the California Fish and Game Commission, California Department of Fish and Game and the National Park Service" on January 14, 1966[35] to control the size of the herd and fulfill its management responsibilities in the Sequoia National Game Preserve.

Another statute, the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528 *et seq.*,[36] reinforces the multiple objective management policies established by Congress for the Mineral King area and pursued by the Secretary.

16 U.S.C. 528 declares that:

> "It is the policy of Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. . . ."

In summary, the limits on the authority of the Secretary of Agriculture must, therefore, be judged very broad indeed. He is under mandate to manage forest lands with a multipurpose objective in mind. His specific guidance in this particular case—the establishment of the Sequoia National Game Refuge—does not constitute an embargo on winter sports activities at Mineral King but rather a mandate to protect animals and people from hunters and trappers. The game refuge does not create a zoo nor does it ordain a virgin wilderness for the exclusive habitation of animals. To infer either as delimiting the parameters of executive authority in

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[35] Entered into pursuant to "Co-operative Agreement, U.S. Forest Service, R-5, and the Department of Fish and Game, State of California," Forest Service Manual §2611.1, R-5 Supplement No. 37, Amended June 1964.

[36] Full text appears in Brief Appendix A.

this instance is to misconstrue the clear meaning of the Secretary's statutory authority.

V.

THE SECRETARY OF THE INTERIOR HAS AUTHORITY TO PERMIT THE CONSTRUCTION OF A TRANSMISSION LINE ACROSS SEQUOIA NATIONAL PARK TO SERVE MINERAL KING

The Sierra Club contends that 16 U.S.C. 45(c), expanding Sequoia National Park in 1926, prohibits the Secretary of the Interior from granting any right-of-way for electric transmission lines through Sequoia National Park without specific authority of Congress. The review of the legislative history of this and related statutes which follow not only demonstrates that the Secretary of the Interior does have ample specific statutory authority to permit the construction of the transmission line, but also confirms the conclusion reached by the Ninth Circuit that the limitation on the construction of transmission lines in Sequoia National Park in Section 45(c) was intended to apply only to transmission lines constructed in conjunction with hydroelectric projects.

There are two statutes which specifically authorize the Secretary of the Interior to grant permission to construct transmission lines across all national parks. First is 16 U.S.C. 79. This statute was one of the earliest statutes (1901) to deal with the issue of rights-of-way over public lands for transmission lines and authorized a form of revocable permit. Section 79 states in part:[37]

> "The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, California for electrical plants, poles, and lines for the generation and distribution of electrical

[37] Full text appears in Brief Appendix A.

> power, . . . *And provided further,* That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

The purpose of this legislation was set forth in the Report of the House Committee on Public Lands[38] on the bill which ultimately became Section 79. The Report indicated that the new legislation would bring together in one act the several acts relating to rights-of-way through certain parks, reservations and other public lands and to provide specifically for rights-of-way for electrical power development. It should be noted here that the Sierra Club's further contention that Section 79 is limited by their interpretation of 16 U.S.C. 1 (i.e., the "park purpose" requirement, dealt with more fully, *infra,* Section VI) is simply erroneous. 16 U.S.C. 4 explicitly states that the provisions of 16 U.S.C. 1 shall not modify the provisions of Section 79.

The second source of statutory authority granting the Secretary of the Interior power to permit the construction of transmission lines in national parks is 16 U.S.C. 5. The relevant portion of Section 5 states:[39]

> "The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, ..."

As in the case of the Forest Service term permit authority discussed *supra,* the purpose of this act was to ease the bur-

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[38]H. Rep. No. 1850, 56th Cong., 1st Sess. (1900).

[39]Full text appears in Brief Appendix A.

den of financing construction of transmission lines by authorizing a more secure grant of tenure to the permittee to the land upon which the lines would be placed.[40]

Section 79 and Section 5 leave the Secretary with a choice of the type of permit to issue to authorize construction of transmission lines over public lands. He may issue a revocable permit which would place the permittee at his peril should the permit be revoked or should the lines have to be relocated, or he may issue a term permit which would provide the permittee with a more secure interest in the land transgressed and make the government responsible for the cost of the relocations. The Sierra Club suggests here that only a term permit under 16 U.S.C. 5 would be appropriate due to the investment required for the power line at issue but such a contention is irrelevant. The Secretary has adequate authority to grant either type of permit that he, in his discretion, deems appropriate in the particular situation.

Having determined that the Secretary has sufficient authority to authorize the construction of the power line, a further inquiry is necessary to determine if there are any limits to that authority. In the case of Sequoia National Park only one possible limitation exists—16 U.S.C. 45(c)—a proviso attached to a 1926 statute amending the boundaries of Sequoia National Park, which reads in part as follows:[41]

> "*Provided*, That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress."

The bare language of the statute, stripped of its historical context and read without any understanding of the develop-

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[40]H. Rep. No. 967, 61st Cong., 3rd Sess. (1911).

[41]Full text appears in Brief Appendix A.

ment of hydroelectric power in the United States admits of two interpretations: First, absolutely no transmission line may exist in Sequoia National Park without prior Congressional approval, whether it be used for transmission or even *utilization* of power; or second, no transmission line or any "other works" serving either the purpose of storage or carriage of water or development, transmission or utilization of power (i.e., a purpose associated with a hydroelectric power development) may exist in Sequoia National Park without prior Congressional approval. The correct interpretation is established in the legislative history of Section 45 (c).

Senate 45(c) had its genesis in fears that the Federal Power Act of 1920, 41 Stat. 1063, 16 U.S.C. 791 *et seq.*, which created the Federal Power Commission and conferred upon it authority to license hydroelectric projects on public lands, would result in huge dams being built in national parks. Not without foundation,[42] these fears were first allayed by an amendment to the Federal Power Act in 1921 prohibiting the licensing of projects in national parks without specific Congressional authority. 41 Stat. 1353, 16 U.S.C. 797(a). In an oral report on the pending amendment which ultimately became Section 797(a), Senator Jones explained its purpose as follows:[43]

> "At the last session we passed the water-power bill. It was not signed on the last day of the session. It was supposed of course, to have failed by reason of the failure to be signed, but upon investigation we reached the conclusion that the President had further time to consider the bill.
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> "Upon a conference with the Secretary of the Interior I found that he had objected to the signing of the bill for the reason that it embraced within its terms and gave jurisdiction to the commission over

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[42]The Raker Act of 1913, 38 Stat. 242, authorized the City of San Francisco to construct Hetch Hetchy Dam in Yosemite National Park.

[43]60 Cong. Rec. 403-404 (1920).

national parks. He did not think that this should be done. He thought that no permit for the construction of water power, dams, reservoirs, houses, and so forth, in national parks should be made except by an act of Congress and all the circumstances considered. I assured him that if he would withdraw his objection to the signing of the bill I would introduce a measure at the opening of this session taking the national parks out of the jurisdiction of the Water Power Commission. I, of course, committed no one but myself. Upon that assurance he withdrew his objection, and the bill was signed, and the water-power legislation is now on the statute books.

"This bill was introduced to carry out that assurance given to the Secretary . . ."

The language of Section 797(a) was not clear as to whether or not it applied prospectively and therefore, after 1921, when new national parks were created or additional land was added to existing parks wherein possible hydroelectric projects sites existed, a special clause was attached to the enabling legislation to insure that the hydroelectric licensing authority of the Federal Power Commission did not apply within the limits of any national park. The usual clause, used in at least 15 instances, was:

". . . *Provided*, that the provisions of the Federal Power Act shall not apply to or extend over such lands."[44]

In the case of Sequoia National Park, however, the language used to prohibit hydroelectric licensing, Section 45(c), was

[44]Yellowstone National Park, 16 U.S.C. 21(b); Yosemite National Park, 16 U.S.C. 47(b); Big Bend National Park, 16 U.S.C. 158; Rocky Mountain National Park, 16 U.S.C. 197; Lassen Volcanic National Park, 16 U.S.C. 201(b); Grand Canyon National Park, 16 U.S.C. 221(b); Acadia National Park, 16 U.S.C. 342(b); Hawaii National Park, 16 U.S.C. 391(b-1); Bryce Canyon National Park, 16 U.S.C. 402(e); Shenandoah and Great Smoky National Parks, 16 U.S.C. 403(b); Mammoth Cave National Park, 16 U.S.C. 404(b); Carlsbad Caverns National Park, 16 U.S.C. 407(b); Isle Royal National Park, 16 U.S.C. 408(b); Everglades National Park, 16 U.S.C. 410(b).

different. In spite of this fact, the purpose of Section 45(c) was identical to the purpose of the more frequently used provision set forth above, namely to insulate Sequoia from the threat of FPC-licensed hydroelectric projects. Section 45(c) was not intended to repeal the authority of the Secretary of the Interior to grant rights-of-way for transmission lines under 16 U.S.C. 79 or 16 U.S.C. 5. In fact, the very ambiguity leading the Sierra Club to its erroneous contention here was plainly laid to rest in testimony by a National Park Service representative before the House Committee on Public Lands when the Committee was considering the legislation which is now 45(c):[45]

> "The Chairman. You do not have the ordinary provisions you have in the other bills, that the water power act shall not extend to this park, do you?
>
> "Mr. Demaray. That is covered in that proviso on page 7—
>
> > '*Provided*, that no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as herein constituted, shall be granted or made without specific authority of Congress.'
>
> "That, in effect, is exactly the same.
>
> "The Chairman. Why do they have it in that form? Why do they not use the usual phraseology that it shall not apply? What is the purpose of the language?
>
> "Mr. Demaray. Well, other than to say that Congressman Barbour desired it in this form and as he is the author of the bill we had no objection to stating it in whatever terms he desired to state it.
>
> "Mr. Swing. A mere choice of phraseology. The result is the same.

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[45] *Hearings on H.R. 9387, H.R. 9916 and H.R. 10126 before the House Committee on Public Lands*, 69th Cong., 1st Sess., at 30 (1926).

"Mr. Demaray. Yes; absolutely the result is the same.

"The Chairman. Have you compared it to find out whether it is identical?

"Mr. Demaray. Yes, sir; it was compared in our office.

"Mr. Winter. You mean the effect is the same?

"Mr. Demaray. Yes; the effect."

In summary it seems clear that the only transmission lines that require Congressional approval pursuant to Section 45(c) are those transmission lines that would be subject to Federal Power Commission jurisdiction, i.e. those lines which are part of a hydroelectric power project.[46] Since the transmission line contemplated in the Disney project is not part of a hydroelectric power project, Section 45(c) does not apply.[47]

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[46]The United States Court of Appeals for the District of Columbia Circuit has held that transmission lines that cross lands of the United States but which are not part of a hydroelectric project are not within the authority of the Federal Power Commission and must be licensed by the department having jurisdiction over the public lands in question. With regard to the Secretary of the Interior, the Court stated: "There would seem to be no necessity. . .to take from the Secretary of the Interior authority to determine the use of public lands within his jurisdiction for a transmission line which is not part of a hydro-electric project." *Pacific Power and Light Company v. F.P.C.*, 184 F.2d 272, 274 (D.C. Cir. 1950).

[47]The language of Section 45(c) has been applied once, and then for the purpose for which it was intended. In 1963, in connection with Federal Power Commission re-licensing of it's Kaweah No. 3 Project, the Southern California Edison Company was required to obtain legislation specifically authorizing the Secretary of the Interior to issue a permit for the continued operation, maintenance and use of hydroelectric facilities within Sequoia National Park. See 77 Stat. 70.

VI.

THE SECRETARY OF THE INTERIOR HAS AUTHORITY TO PERMIT THE STATE OF CALIFORNIA TO IMPROVE A ROAD IN SEQUOIA NATIONAL PARK WHICH PROVIDES ACCESS TO MINERAL KING

Congress has given the Secretary of the Interior general authority to make such rules and regulations as he deems necessary or proper for the use and management of the National Parks.[48] In addition, the Secretary has been given specific authority to construct and improve roads and trails in the national parks, 16 U.S.C. 8. Section 8 states:

> "The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior."

Section 8 was enacted to authorize a road building and improvement program in the national parks to compliment the then existing programs in the national forest and other areas of the public domain. At the time of its enactment, practically all national park roads were in a dangerously unsatisfactory condition. Then Secretary of the Interior, Hubert Work, in a letter to the Chairman of the Committee on Public Lands submitting draft legislation which later became Section 8 stated ". . . the existing park roads are in many instances too narrow for safe driving, contain too much adverse grade, and particularly have not the base to withstand the continuous and severe pounding of modern high-powered motor vehicle travel."[49] In confirming this position, the Committee stated in its report at page 4:

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[48] 16 U.S.C. 1, *et seq.*

[49] H. Rep. No. 258, 68th Cong., 1st Sess., at 2 (1924).

> "However, the national parks were set aside for the benefit and enjoyment of the people of this country. They have great scientific and educational value. They should not be regarded as revenue producers, but rather as areas of which this Nation should be very proud. *They should be made more accessible and their roads should be modern, safe highways, suitable for modern means of transportation.*" (Emphasis added.)

The type of construction proposed across Sequoia National Park in this case is the precise type of road improvement construction that was contemplated by Congress when it enacted Section 8. The existing Mineral King road is inadequate for modern motor vehicle travel, too narrow for safe driving, contains too much adverse grade, and it has sharp and dangerous curves.[50] The proposed road is designed specifically to correct these existing problems.

The Sierra Club contends, however, that the proposed Mineral King road does more than improve an existing road and constitutes a totally new road. Without distinguishing between a relocated road and a new road and with no regard for the elementary fact that any modern road improvement involves substantial realignments, the Sierra Club blandly lables the proposed road a "freeway" and proceeds to quarrel with a discretionary government management decision by dredging up self-serving arguments from road battles they have fought elsewhere in the past, and inferring national policy from unrelated legislation.

Before dealing with these contentions it should be clearly understood that Section 8 was enacted specifically to authorize the Secretary of the Interior to improve existing park

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[50]For a description of the existing road, see *Report of Route Studies*, Petitioner's Appendix 58, 60. See also Associated Press news story appearing in *The Washington Post*, July 6, 1971, at p. A2 which discusses the inadequate conditions of a great many national park roads and the danger posed to motorists. The article notes that pressure from conservation groups is one of the greatest stumbling blocks to accomplishing needed improvements.

roads. The Secretary exercised his authority in this case under this Section and decided, after considering alternative proposals, to issue a permit to the State of California to improve the existing road in the manner proposed. His action was fully within his statutory authority. Moreover, it should be born in mind that Sequoia National Park does not exist in a vacuum. It is therefore important in determining what use is to be made of the park land to take into account the total environment in which the park exists. Of particular significance in comprehensive park management are the recreation needs and available recreation facilities within a region. Thus, where national parks and national forests adjoin, the regional recreation resources must be managed in some cohesive manner.[51] Here, the effect of the Sierra Club's contention is to deny the government the opportunity to use two of its parcels of land in such a way that the objectives for which each parcel was reserved are enhanced.

The Sierra Club's primary objection to the road is that irrespective of the Secretary's authority to permit the construction of park roads, his authority is limited by the park purpose requirement of 16 U.S.C. 1.[52] The Sierra Club simply misses the mark when they infer from the very general language referred to as the "park purpose language" that somehow roads through parks are banned. There is no law anywhere to support this contention and in point of fact reference to any ordinary filling station road map demon-

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[51] The Forest Service and the Park Service have formalized their cooperative research and planning efforts to insure optimum attainment of the missions of both agencies. *Compilation of Administrative Policies for the National Parks and National Monuments of Scientific Significance* (*National Area Category*), U.S. Department of the Interior, National Park Service (Rev. 1970), at 31-32.

[52] The two park purposes set forth in 16 U.S.C. 1 are ". . . [1] to conserve the scenery and the natural and historic objects and wildlife therein and [2] to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."

strates that there are many instances where roads cross national parks as part of a state or U.S. highway system.[53]

Quite the contrary, 16 U.S.C. 1 requires the Park Service to so regulate national parks that the measures they take "conform to the fundamental purpose of said parks . . ." In this case at least three studies on the road and its impact were made and considered by the Department of the Interior prior to reaching its decision to approve the road.[54] The mere fact that the proposed road would serve purposes beyond an exclusive park purpose does not, as contended, prevent the Secretary of the Interior from exercising his authority to permit construction of the road.

The Sierra Club's second contention is that 16 U.S.C. 8 permits only the Secretary to build and improve roads and that he may not delegate his authority to build and improve roads to the State of California. This argument is without merit because the authority delegated here is not of a quasi-legislative nature and the means chosen to accomplish the actual construction are for the Secretary to determine in his discretion. *Berman v. Parker*, 348 U.S. 26, 33 (1954).

It is next claimed that the House Committee on Interior and Insular Affairs in dealing with the establishment of the Padre Island National Seashore in 1962 somehow established a general Congressional prohibition against Section 8 roads through areas under the control of the National Park Service if they are used to "connect with existing road systems." This claim misinterprets the events surrounding the Padre Island legislation.

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[53]For example: Washington Route 123 through Mt. Rainier National Park; U.S. Route 101 through Olympic National Park; California Route 198 through Sequoia National Park; California Routes 120 and 41 through Yosemite National Park; California Route 89 through Lassen Volcanic National Park; U.S. Route 26-89-187 and U.S. Route 26-89-287 through Grand Teton National Park; U.S. Routes 20 and 89 through Yellowstone National Park; U.S. Route 34 through Rocky Mountain National Park; Utah Route 15 through Zion National Park.

[54]The studies are reproduced at Petitioner's Appendix 57, 83, 140.

As introduced, according to the House Report, the House version of the bill *required* the National Park Service to construct a road the full length of the proposed National Seashore.[55] According to the report, this requirement would impute to the Park Service a function that does not properly belong to it. With this we fully agree. The Park Service should never be *required* to construct a road through a national park or national seashore since, as pointed out in the report, such a road might spoil the very assets which the creation of the park was intended to preserve. Nowhere, however, does this report or any other legislation prohibit the Park Service from constructing a "through" or "connecting" road in a park when the Service determines that public use calls for such construction. The House report specifically states at page 2717:

> "The Park Service will be able, under its general authority, to supplement these outside roads [access roads from the North and South outside the seashore] with others inside the seashore as public use of the seashore indicates the need therefore."

The Sierra Club's final contention is that the Department of the Interior has violated its own rules in failing to conduct hearings on the proposed improvement of the Mineral King road. This contention is based upon regulations adopted by the Secretary of the Interior on January 29, 1969, 34 Fed. Reg. 19. These regulations would have required a public hearing whenever a proposed project involved improvement of an existing road and the project would have had a substantial social, economic, or environment effect. These regulations were revoked, however, by the Secretary of the Interior on April 21, 1969, 34 Fed. Reg. 6985.

The Sierra Club argues that the revocation was ineffective because it did not conform to a number of provisions of the Administrative Procedure Act relating to the promulgation

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[55] H. Rep. No. 2179, 87th Cong., 2nd Sess. (1962), U.S. Code Cong. & Ad. News 2717 (1962).

of regulations. This contention is wrong for two reasons. First, the procedural requirements set forth in Section 4 of the Administrative Procedure Act for promulgating regulations, 5 U.S.C. 553, do not apply in cases where what is involved is "a matter relating to agency management of personnel or to public property, loans, grants, benefits or contracts." 5 U.S.C. 553(a)(2). *Duesing v. Udall,* 350 F.2d 748, 752 (D.C. Cir. 1965) cert. den., 383 U.S. 912 (1966).

Second, the argument fails in logic. Either the promulgation and revocation were effective in spite of Administrative Procedure Act requirements, or *neither* the promulgation *nor* the revocation were effective because the same procedures were followed to promulgate the regulations as to revoke them. Thus, the regulations requiring a hearing are of no force and effect.[56]

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Ninth Circuit should be affirmed.

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August, 1971

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[56]It should be noted that the Secretary has recently adopted a policy whereby regulations calling or revoking a hearing will in the future be subject to procedures set forth in the Administrative Procedure Act. "Public Participation in Rule Making," 36 Fed. Reg. 8336 (May 4, 1971).

APPENDIX A

16 U.S.C. 5

The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-way herein granted for any one or more of the purposes herein named: *Provided*, That such right-of-way shall be allowed within or through any national park or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all or any part of such right-of-way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for non-use for a period of two years or for abandonment.

Any citizen, association, or corporation of the United States to whom there has been issued a permit, prior to March 4, 1911, for any of the purposes specified herein under any law existing at that date, may obtain the benefit of this section upon the same terms and conditions as shall be required of citizens, associations, or corporations making application under the provisions of this section subsequent to said date. (Mar. 4, 1911, ch. 238, 36 Stat. 1253; May 27, 1952, ch. 338, 66 Stat. 95.)

16 U.S.C. 45c

Nothing contained in section 45a or 45b of this title shall affect any valid existing claim, location, or entry established prior to July 3, 1926, under the land laws of the United States, whether for homestead, mineral, right-of-way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land: *Provided*, That under rules and regulations to be prescribed by him the Secretary of the Interior may issue permits to any bona fide claimant, entryman, landowner, or lessee of land within the boundaries established by sections 45a–45e of this title to secure timber for use on and for the improvement of his land; and he shall also have authority to issue, under rules and regulations to be prescribed by him, grazing permits and authorize the grazing of livestock on the lands within said park at fees not to exceed those charged by the Forest Service on adjacent areas, so long as such timber cutting and grazing are not detrimental to the primary purpose for which such park is created: *Provided*, That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress. (July 3, 1926, ch. 744, § 3, 44 Stat. 820)

16 U.S.C. 79

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights-of-way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reser-

voirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted under this section for any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given under this section for telegraph and telephone purposes shall be subject to the provision of sections 1-6, and 8 of Title 47, regulating rights-of-way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park. (Feb. 15, 1901, ch. 372, 31 Stat. 790; Mar. 4, 1940, ch. 40, §2, 54 Stat. 43.)

16 U.S.C. 497

The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or

maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; (b) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding five acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining summer homes and stores; (c) to permit the use and occupancy of suitable areas of land within the national forest, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining buildings, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests; (d) to permit any State or political subdivision thereof, or any public or nonprofit agency, to use and occupy suitable areas of land within the national forests not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining any buildings, structures, or facilities necessary or desirable for education or for any public use or in connection with any public activity. The authority provided by this section shall be exercised in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests. (Mar. 4, 1915, ch. 144, 38 Stat. 1101; July 28, 1956, ch. 771, 70 Stat. 708.)

16 U.S.C. 528

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of sections 528-531 of this Title are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in section 475 of this title. Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several States with respect to wildlife and fish on the national forests. Nothing herein shall be construed so as to affect the use or administration of the mineral resources of national forest

lands or to affect the use or administration of Federal lands not within national forests. (Pub. L. 86-517, §1, June 12, 1960, 74 Stat. 215.)

16 U.S.C. 529

The Secretary of Agriculture is authorized and directed to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom. In the administration of the national forests due consideration shall be given to the relative values of the various resources in particular areas. The establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of sections 528-531 of this title. (Pub. L. 86-517, §2, June 12, 1960, 74 Stat. 215.)

16 U.S.C. 530

In the effectuation of sections 528-531 of this title the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests. (Pub. L. 86-517, §3, June 12, 1960, 74 Stat. 215.)

16 U.S.C. 531

As used in sections 528-531 of this title the following terms shall have the following meanings:

(a) "Multiple use" means: The management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the

land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

(b) "Sustained yield of the several products and services" means the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land. (Pub. L. 86-517, §4, June 12, 1960, 74 Stat. 215.)

16 U.S.C. 688

All parts of township 17 south, ranges 31 and 32 east, and township 18 south, range 31 east, Mount Diablo base and meridian, which are north of the hydrographic divide passing through Farewell Gap, and which are not added to and made part of the Sequoia National Park by the provisions of sections 688-689d of this title, are designated as the Sequoia National Game Refuge, and the hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of the United States within the limits of the said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture: *Provided*, That it is the purpose of this section to protect from trespass the public lands of the United States and the game animals which may be thereon, and not to interfere with the operation of the local game laws as affecting private or State lands: *Provided further*, That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established. (July 3, 1926, ch. 744, §6, 44 Stat. 821; June 25, 1948, ch. 645, §13, 62 Stat. 861.)

APPENDIX B

SKI AREAS UNDER TERM AND REVOCABLE PERMIT SIMILAR TO PROPOSED MINERAL KING PERMITS*

STATE AND AREA NAME OR PERMITTEE

Arizona: Arnal Corporation

California:

- Heavenly Valley
- Sierra Ski Ranch
- June Lake Development Co.
- Lakeshore Resort
- Mammoth Mountain Ski Area
- Snow Valley, Inc.
- Snow Summit Ski Corp.
- Moonridge Mountain Estates, Inc.
- Weirick and Company
- Dodge Ridge Corp.
- Sugar Bowl Corp.
- Auburn Ski Club
- Alpine Meadows of Tahoe
- Mount Reba
- Pinecrest Lodge

Colorado:

- Arapaho Basin
- Aspen
- Aspen Highlands
- Breckenridge
- Buttermilk
- Copper Hill
- Crested Butte
- Geneva Basin
- Lake Eldora
- Loveland Valley and Loveland Basin
- Monarch
- Mount Werner
- Pikes Peak
- Powderhorn
- Purgatory
- Snowmass
- Sunlight
- Vail
- Winter Park
- Wolf Creek

---

*Source: U.S. Forest Service, *Hearings on H.R. 9417 before the Senate Appropriations Committee, Subcommittee on Interior and Related Agencies*, 92nd Cong., 2nd Sess. (1971), Page Proof page number 2922-2923.

Montana:

- Dillon Ski Club
- Grizzly Peak
- Kings Hill
- Missoula Snow Bowl
- Bridger Bowl
- Big Mountain

Nevada:

- Heavenly Valley
- Lee Canyon

New Hampshire:

- Wildcat Mountain
- Loon Mountain
- Waterville Valley
- Mount Attitash

New Mexico:

- Taos Ski Valley
- Lake Peak Corp., Santa Fe Ski Basin

Idaho:

- Bogus Basin
- Skyline
- Brundage Mountain
- Magic Mountain
- Schweitzer Basin

Maine: Evergreen Valley

Michigan: Big M

Minnesota: Lookout Mountain

Oregon:

- Spout Springs
- Mount Ashland
- Mount Hood Meadows
- Hoodoo Ski Bowl
- Arbuckle Mountain

South Dakota: Stewart Slope

Utah:

- Alta-Snowbird
- Beaver Mountain
- Snow Basin
- Brian Head

Vermont:

- Haystack Mountain
- Sugar Bush Valley

Washington:

- Hyak
- Mission Ridge
- Snoqualmie Summit
- Stevens Pass
- White Pass
- Mount Pilchuck
- Crystal Mountain
- Alpental

Wyoming:

- Antelope Butte
- Meadowlark
- Sleeping Giant
- Fred's Mountain
- Snow King Mountain Teton Pass
- Jackson Hole

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AUG 23 1971

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 70-34

SIERRA CLUB, a California corporation,
Petitioner,

vs.

ROGERS C. B. MORTON, individually and as Secretary of the Interior of the United States, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of the County of Tulare as Amicus Curiae

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief of the County of Tulare as Amicus Curiae

STATEMENT OF THE CASE

Mineral King is a valley in the Sierra Nevada Mountains of California, east of Visalia in the County of Tulare. It is not a wilderness and it has not been since the gold and silver mining days of the 1870's (A. 80). In the early 1900's hydroelectric facilities which are still in use were built at Mineral King (A. 75), and for several decades it has been a summer retreat. Many cabins, summer homes, two small resorts, a commercial pack station, and three public camp grounds are located there (A. 80).

Most of the land at Mineral King is owned by the United States and is managed by the United States Forest Service as part of the Sequoia National Forest. It adjoins Sequoia National Park which is managed by the National Park Service. The sole approach to Mineral King is a county-maintained road which passes through Sequoia National Park (A. 73). Since its expansion by Congress in 1926, Act of July 3, 1926, 44 Stat. 818, Sequoia National Park has bounded Mineral King on three sides. In general hunting is allowed in national forests but not in national parks. For that reason Mineral King was designated as a game refuge in the 1926 legislation to protect both animals and vacationers from hunters.[1]

For over twenty years Mineral King has been recognized as a potential site for one of the world's finest winter sports and ski areas.[2] In 1949 the Secretary of Agriculture created the Mineral King Recreation Area, reserving the valley for public recreation,[3] and tried to develop a winter sports area

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1. *Hearings on H.R. 4095 Before the House Committee on Public Lands,* 68th Cong., 1st Sess. 24 (1924)

2. Mineral King is "probably the most spectacular site for commercial [ski] development on the west slope of the Sierra." David S. Brower and Richard H. Felter, *Surveying California Ski Terrain,* 33 SIERRA CLUB BULL. 97, 102 (1948).

3. The order of reservation dated May 13, 1949 and signed by the Secretary of Agriculture is a map on file with the Forest Supervisor of the Sequoia National Forest and provides:

> By virtue of the authority vested in me as Secretary of Agriculture by the Act of June 4, 1897 (30 Stat. 35) and the Act of February 1, 1905 (30 Stat. 828), and in accordance with Regulation U-3(b) (Sec. 251.22, Chapter II, Title 36 C.F.R.) of this Department this area, as shown by this map and legal description, is classified as the Mineral King Recreation Area, and is hereby set apart and reserved for public recreation use and closed to all other occupancy and use except such uses as the Regional Forester may authorize as being consistent with recreation use.

so that "the scenic, aesthetic, and recreational resources of Mineral King can be enjoyed by the American people" (T.R. 52). At that time the Forest Service was unable to interest any developer in the project because of the expense of providing adequate access.

In 1965 the Forest Service published a prospectus inviting public bids for the construction and operation of recreational facilities at Mineral King. The proposal of Walt Disney Productions was chosen from six submitted, and the Forest Service granted Disney a preliminary permit to prepare a master plan for the Mineral King recreational area. The preliminary permit provided that a final permit would be granted only upon Forest Service approval of the master plan and award by the State of California of the first contract for construction of a significant portion of an access road (A. 166-67).

To make public recreation at Mineral King possible the State of California has proposed to construct a two-lane, all-weather access road (not a high speed "freeway" as the Sierra Club repeatedly asserts) (A. 54). After two studies and a public hearing on highway location and design, the California State Highway Commission adopted a route, a large portion of which follows the existing road (A. 54-73, 83-124).

The Mineral King Road was not approved in a vacuum. The Wilderness Act of 1964, 78 Stat. 890, 892, 16 U.S.C. § 1132(c), required the Secretary of the Interior to study roadless areas of more than 5,000 acres in national parks for possible inclusion in the National Wilderness Preservation System. The Department of the Interior held public hearings in 1966 in Fresno to gather local views on its wilderness proposals for Sequoia and Kings Canyon

National Parks. Access to Mineral King overshadowed any other issue discussed at the hearing, with the Sierra Club strongly opposing a corridor to make recreational use of Mineral King possible.

On the basis of the Secretary's recommendations, the President has now asked Congress to place 721,970 acres of Sequoia and Kings Canyon National Parks in wilderness management, while leaving an access corridor to permit recreational use of Mineral King. The President has also recommended that a 12,500 acre area of Sequoia National Park, adjacent to Mineral King, be excluded from wilderness so that it can be enjoyed by the many hikers, campers and cross-country skiers who will visit Mineral King.[4]

The Secretary of the Interior approved the segment of the road which would pass through Sequoia National Park after reviewing "all material available" (A. 139), including four studies[5] which considered the impact on the park and the forest, fish and wildlife, the giant Sequoias and streams, possible alternative routes and the opposition to the road. The road route was chosen to avoid harm to

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4. The Department of the Interior held two days of public hearings on November 21 and 22, 1966 in Fresno, California on its proposals for inclusion of certain areas of Sequoia and Kings Canyon National Parks in the National Wilderness Preservation System. *Official Report of Proceedings Before the National Park Service of the U.S. Department of the Interior, Fresno, California,* November 21, 22, 1966. The wilderness recommendations of the Secretary of the Interior, now embodied in H.R. 8626, 92d Cong., 1st Sess. (1971), specifically contemplate improvement of the Mineral King road to permit outdoor recreation at Mineral King. H.R. Doc. No. 92-102, 92d Cong., 1st Sess. (1971).

5. The four studies were the Report of Route Studies by the State of California (A. 57-73), the Hartesveldt Report (A. 83-124), the Clarkeson Engineering Report (A. 140-157) and the Forest Service Mineral King Highway Impact Survey Report, Stage I, April 1968.

any of the significant giant Sequoias for which the park was named (A. 62).

The final permit the Forest Service proposed to issue to Disney for the Mineral King development would actually be two permits: one a thirty-year term permit for approximately sixty-six acres "constituting the sites physically occupied by capital improvements" (A. 15); the other a supplemental revocable special use permit for about two hundred fifty acres for works necessary "in conjunction with the facilities and improvements" built under the term permit (A. 23).[6] This is the same procedure previously followed by the Forest Service in establishing eighty-four other ski areas in the national forests (A. 169).

In January 1969 the Forest Service approved the Disney master plan. In June 1969, after twenty years of Forest Service planning for public outdoor recreation at Mineral King, and nearly four years after the Forest Service publicly announced its solicitation of proposals, the Sierra Club brought an action in the district court for the Northern District of California seeking an injunction. It alleged the Secretaries of the Interior and Agriculture lacked authority to permit the proposed recreational use of Mineral King and abused their discretion in deciding to grant such permits. The trial court, after a hearing on affidavits, granted a preliminary injunction without requiring the Sierra Club to post a bond.

On interlocutory review of the preliminary injunction the court of appeals held that the Sierra Club lacked standing to maintain the action. It also held unanimously

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6 All permanent structures will be built on the approximately 66 acres held under term permit. See Reply Brief for Appellants, pp. 5-6, Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

that the district court had abused its discretion by granting the preliminary injunction, because there was little or no likelihood the Sierra Club could prevail on the merits.

With the preliminary injunction in force the National Park Service has refrained from issuing a permit to the State of California to improve the access road traversing Sequoia National Park, and the Forest Service has not issued its final permit to Disney.

The relevant portions of statutes involved are set out in the Appendix to the Brief for Petitioner.

INTEREST OF THE AMICUS CURIAE

This brief of an *amicus curiae* is filed pursuant to Rule 42 of this Court. It is filed by the County of Tulare, a political subdivision of the State of California, and is sponsored by the authorized law officer thereof, Calvin E. Baldwin, County Counsel. The County is the residence of the people most directly affected by the proposed recreational use of Mineral King.

The demand for public outdoor recreation facilities is expanding explosively and Tulare County is trying to help meet that demand in ways which protect the Sierra from the raw speculative plunder which has characterized so much recreational development in the past. For that reason the County has cooperated with federal and state authorities over several years in planning for year-round outdoor recreation at Mineral King.

Land use is also a critical economic concern to the County. Tulare County is an economically depressed area with high unemployment and a tax base too small to meet its growing requirements for public services. Approximately one-half of the land within its boundaries is in fed-

eral ownership and thus exempt from property tax. The County has inhibited rural subdivisions by encouraging the conservation of most of the private agricultural lands in the County under the California Land Conservation Act of 1965, CAL. GOV'T. CODE, §§ 51200-95. The Mineral King recreational area can help the County to provide for orderly development of public recreational facilities, to cure its present depressed economic condition and to mitigate the tax revenue losses associated with its land conservation program.

SUMMARY OF ARGUMENT

The Sierra Club Lacks Standing.

The Sierra Club is an old and respected institution. In its youth its members, mostly San Franciscans, chronicled their adventures—hiking, climbing and exploring in the Sierra. In its maturity it grew across the nation as an effective advocate in Congress for the preservation of nature and the wilderness.

Riding the crest of legitimate public concern for the environment the Sierra Club now asks this Court to anoint it as "Guardian ad Litem" of the public lands to impose its preference for minimal use of the national parks and forests on the American people. No one can dispute the need to protect our environment from continuing despoliation, but Congress, chosen by the people, is charged by the Constitution with responsibility for public lands. Congress has delegated the management of these lands to the executive branch, not to the courts, and not to private conservation clubs.

No arm of the government other than the executive is capable of administering the public lands. This case involves decisions about permits to use approximately 316

acres of Forest Service land. This decision-making process is repeated time after time, day after day, throughout the 44,000,000 acres of federal public land in California alone. Neither Congress nor the judiciary is capable of scrutinizing each land management decision challenged by a "public interest" club.

The district court acted erroneously when it abandoned well-established principles of standing to permit the Sierra Club to maintain this action. This Court has recognized only two ways in which a plaintiff can have standing: either through establishing his own personal stake in the outcome, *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970), or by acting as a private attorney general deputized by Congress in a regulatory statute to assert the public interest against an administrator who strays beyond the limits of his authority. *Associated Industries v. Ickes,* 134 F.2d 694 (2d Cir.), *vacated as moot,* 320 U.S. 707 (1943).

The Sierra Club has failed to show a personal stake in the outcome of this case.[7] An organization's personal stake can be injury to itself as an organization or as a representative of its members. The Sierra Club has shown neither. It is not harmed as a club. Having previously suggested that Mineral King was a good place for a ski area,[8] the Sierra Club could reverse its opposition tomor-

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7. For a thorough discussion of the personal interest requirement and why it should continue to be the test of standing, see Comment, *Standing to Challenge Administrative Action: The Concept of Personal Stake,* 39 GEO. WASH. L. REV. 570 (1971).

8. In 1965 Seymour Ossofsky of the Sierra Club urged a House Interior Subcommittee not to allow the Secretary of Agriculture to permit skiing at San Gorgonio in Southern California. He testified:

I also speak as the chairman of the ski mountaineers section of the Sierra Club chapter in this area. I have been an official of that organization in various capacities for 7 years. I am also a

row. Nor will any of its members suffer special harm if public winter sports are permitted at Mineral King. The judicial process should not be manipulated at the whim of groups which have no personal stake in the outcome of litigation.[9]

The Sierra Club, in recognition of its lack of personal stake in the outcome, asserts that it is a private attorney general with a mandate flowing from Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702, to redress the sins of erring administrators. Congress can designate a person with no personal stake in the outcome of litigation as

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member of the Far West Ski Association. Thus, I speak as a person devoted to resort skiing as well as wilderness (cross-country) skiing. . . .

San Gorgonio is overrated as a ski area in another important respect—its convenience to Los Angeles. . . .

But in contrast, it will only be 4 or 5 hours drive to projected ski resorts in the Sierra Nevadas such as Mineral King and Robinson Basin. Both offer far better skiing than San Gorgonio; and Mineral King is even now being bid upon for development in the very near future. *Hearings on H.R. 6891 and Related Bills Before the Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs,* 89th Cong., 1st Sess., ser. 89-36, 344-45 (1965).

9. The Sierra Club is not attempting to vindicate a legal right, but to impose its current policy views on the Secretary of Agriculture and the public. Although it claims to represent the "public interest" in conservation, many conservationists support recreational use of Mineral King and are actively advising Disney on its plans. They include: "Horace M. Albright, former director of the National Park Service and former superintendent of Yellowstone National Park; Dr. Paul F. Brandwein, president, Center for Study of Instruction and former director of Gifford Pinchot Institute for Conservation Studies; Thomas L. Kimball, executive director, National Wildlife Federation; Bestor Robinson, former president and board member of Sierra Club, and formerly chairman of the Interior Secretary's advisory committee on conservation; Eivind T. Scoyen, former superintendent of Sequoia and Kings Canyon National Park and associate director of National Park Service, and William E. Towell, executive vice president, American Forestry Association." L.A. Herald Examiner, Nov. 22, 1969.

a private attorney general to enforce the public obligations of an executive officer. However, such designations have been made only in special regulatory statutes which force the private attorney general to participate in the administrative process, subject to regulations which protect the integrity of the administrative process. If Congress desires the assistance of a roving "private attorney general" to ferret out agency indiscretion in public land management and to place it at the feet of the court, it has not yet so indicated, either expressly or impliedly. The Ninth Circuit properly refused to allow the Sierra Club to invoke the private attorney general status.

The district court's decision ignores Constitutional considerations and the need to safeguard the courts and to further administrative efficiency. It goes far beyond any public interest in conservation and the environment, making every agency action potentially reviewable. The recent flood of suits challenging land management decisions has already prompted the Public Land Law Review Commission to say: "[W]e are apprehensive about the adverse effect on public land management programs which extensive litigation, such as we have witnessed in the last year, might produce."[10]

In urging reversal of the Ninth Circuit decision, the Sierra Club asks this Court to abolish the requirement of standing when administrative decisions are challenged, and to interpose years of delay in the execution of management decisions of all agencies—across the board—at the instance of any "public interest" group.

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10. PUBLIC LAND LAW REVIEW COMM., ONE THIRD OF THE NATION'S LAND, A REPORT TO THE PRESIDENT AND CONGRESS 256 (1970).

The Sierra Club Will Not Prevail on the Merits

The district court erred in issuing the preliminary injunction which has already delayed the Mineral King development over two years. At the hearing on its motion for a preliminary injunction the Sierra Club did not show a strong likelihood or reasonable certainty that it would prevail on the merits.

The Sierra Club has attacked the Secretary of Agriculture's historic practice of combining term and revocable permits for use of national forest land as an "evasion" of acreage "limitations" on term permits. The legislative history of 16 U.S.C. § 497 which authorizes term permits is clear beyond argument; term permits were first authorized in 1915 and their use has been expanded since that time for the sole purpose of granting permittees the security of tenure necessary to obtain construction financing. Were it not for this need the facilities at Mineral King and at eighty-four other western ski resorts holding combined term and revocable permits could be located on Forest Service land held entirely under revocable permit. 16 U.S.C. § 551.

The Sierra Club also asserts that the Secretary of Agriculture abused his discretion by deciding to permit public outdoor recreation in an area described by Congress as the Sequoia National Game Refuge. A game refuge is an area where hunting is prohibited except as authorized by the Secretary. Prohibition of hunting was the sole consequence of Congress' designation of the Mineral King area as the Sequoia National Game Refuge. It did not seal that area off from public recreational use. To the contrary, Mineral King was used for recreation long before it became a game refuge, and that use has never been interrupted. There are several public campgrounds at Mineral King, and one

reason Congress banned hunting was to protect vacationers. Continued recreational use of Mineral King was guaranteed by the Secretary of Agriculture over twenty years ago when he withdrew the area from mining entry to establish the Mineral King Recreational Area.[11]

The Secretary's decison to realize the public winter recreational potential of Mineral King was not a hasty decision. It was an outgrowth of twenty years of Forest Service planning which included extensive surveys and studies, considering, among other things, the impact of such use on the fish and game in the area.

The Sierra Club further asserts that the Secretary of the Interior threatens to violate 16 U.S.C. § 45c by permitting construction of a power line across Sequoia National Park to serve Mineral King. The Secretary has authority to grant revocable, 16 U.S.C. § 79, or term, 16 U.S.C. § 5, rights-of-way for power lines. Section 45c only prohibits Federal Power Commission licensing of hydro-electric power projects and associated primary transmission lines. Since the proposed line is neither a part of a hydro-electric power project nor a primary transmission line, the Secretary's authority to grant this right-of-way is not affected by 16 U.S.C. 45c.

The Secretary of the Interior also has authority to permit the State of California to improve the Mineral King access road. 16 U.S.C. § § 1, 8. Contrary to the Sierra Club's contention, it is neither unlawful nor an abuse of discretion for the Secretary to permit a road to traverse Sequoia National Park to serve the adjoining public national forest lands. The record before the trial court and the recent National Park Service wilderness recommendations for

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11. See note 3 *supra*.

Sequoia National Park demonstrate that the Secretary was exacting in his consideration of the environmental impact of the proposed road.

Since the Secretaries of the Interior and Agriculture in reaching their respective decisions concerning Mineral King acted within the scope of their delegated authority, did not abuse their statutory discretion and followed all necessary procedural requirements, their decisions must stand. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402. (1971).

At the hearing on the preliminary injunction the Sierra Club showed no imminent threat of irreparable harm to it. No physical alteration of Mineral King would have taken place for at least a year. On the other hand, the district court's issuance of a temporary injunction has damaged the United States, the State of California, Tulare County and Disney.

Since there was no strong likelihood or reasonable certainty that the Sierra Club would prevail on the merits, and since there was no immediate threat of harm to it, it was an abuse of discretion for the district court to issue a preliminary injunction.

ARGUMENT

I. THE SIERRA CLUB LACKS STANDING TO MAINTAIN THIS ACTION.

A. The Sierra Club Has No Personal or Direct Interest in the Outcome of This Case.

The Sierra Club has no standing in its own right because it has no personal or direct interest in the outcome of this suit. It has never alleged any individualized injury to itself either as a club or as a representative of its members.

This Court long ago held that to have standing in his own right a party must show "he has sustained or is

immediately in danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally." *Frothingham v. Mellon,* 262 U.S. 447, 488 (1923). This is an outgrowth of Article III of the Constitution which limits the jurisdiction of federal courts to cases and controversies. U.S. CONST. art. III, § 2. In a recent taxpayer suit this Court reemphasized that the Constitution requires a plaintiff to have *"the personal stake and interest* that imparts the necessary concrete adverseness to such litigation so that standing can be conferred . . . consistent with the Constitutional limitations of Article III." *Flast v. Cohen,* 392 U.S. 83, 101 (1968). (Emphasis added.)

Traditionally, this personal stake had to be a recognized legal interest, a "legal right." This common law rule of standing was summarized in *Tennessee Electric Power Co. v. T.V.A.,* 306 U.S. 118, 137-38 (1939), holding that persons threatened with injury could not challenge governmental action "unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege."

Later a substantive legal right was not required when an action was brought pursuant to a specific statutory grant of standing. Thus, this Court in *F.C.C. v. Sanders Bros. Radio Station,* 309 U.S. 470 (1940), granted standing to a competitor to challenge a decision of the Federal Communications Commission under the Federal Communications Act, which allows appeal by persons "aggrieved", though the type of injury to competition involved had never been a traditional legal right.

The Sierra Club's alleged interest in this case is in conservational, recreational and aesthetic values of Mineral King and Sequoia Park. This is not a traditional legal right,[12] nor do any of the relevant land management statutes specifically authorize persons to challenge the decisions of the Secretaries of the Interior and Agriculture. The Sierra Club, however, bases its claim of standing upon Section 10(a) of the Administrative Procedure Act, 5 U.S.C. §§ 551-706.

When passed in 1946, the APA exerted little immediate influence on the law of standing. It was given a more restrictive interpretation than specific regulatory statutes with standing provisions. Courts construed it as merely "reflecting existing law" and required that a party show a legal right when standing was based solely on Administrative Procedure Act provisions.[13] However, the most recent decision of this Court interpreting that act, *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970), indicates that the test of standing under the Administrative Procedure Act is broader than the "legal right" test. To have standing to challenge administrative action under this act a plaintiff must show an "injury in fact" to an interest "arguably within the zone of interests to be protected or regulated by the [relevant] statute. . . ."[14]

To establish standing under the Administrative Procedure Act, then, the Sierra Club must first show that it is "injured in fact" as a club or that it represents its members

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12. Historically "legal right" has been very narrowly interpreted. As this term is used by courts it means a right recognized at common law or an interest specifically created by statute. See Associated Industries v. Ickes, 134 F.2d 694, 700 (2d Cir. 1943).

13. *Cf.*, Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir.), *cert. denied,* 350 U.S. 884 (1955).

14. 397 U.S. 150, 152, 153 (1970).

who are so injured. The requirement of an "injury in fact" to the complaining party is a Constitutional one, and indicates that this Court, although no longer requiring a legal right in cases arising under the Administrative Procedure Act, has not dispensed with the direct or personal interest in the outcome described in *Flast*.[15]

The Sierra Club has not satisfied this requirement. It alleges a general harm to the "public interest," complaining that recreational use of Mineral King will result in "permanent destruction of natural values" and "irreparable harm to the public interest" (A. 212). It has never argued that it has suffered any special injury as an organization. It could not; its purely ideological interest in the preservation of Mineral King and Sequoia National Park is not sufficient to establish the requisite injury in fact under *Data Processing*.

The Sierra Club has a preference for the preservation of the *status quo*. It is now asserting that bias in dozens of actions across the entire country. Brief for the Wilderness Society as Amicus Curiae, p. 14. By assuming the role of a roving quasi-public enforcer, the Sierra Club relinquishes any claim it may have to special injury in fact or personal stake in the outcome of each of these pending suits.[16]

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15. Thus in *Data Processing* this Court applying its "injury in fact" test found, "there can be no doubt but that petitioners have satisfied this test," 397 U.S. at 152. And in Barlow v. Collins, 397 U.S. 159, 164 (1970), this Court said: "there is no doubt that in the context of this litigation the tenant farmers . . . have the personal stake and interest" required.

16. The Ninth Circuit recognized this. Applying the *Data Processing* test of standing that court correctly found that the Sierra Club did not have that direct and personal interest necessary for injury in fact:

> The complainant does not assert that any of its property will be damaged, that its organization or members will be endangered or that its status will be threatened. . . . We do not believe that such club concern without a showing of more direct interest can constitute standing. . . .(A. 217).

The Sierra Club would have this Court dispense with the requirement of a direct and personal injury in fact altogether and find a club's *mere assertion of harm to the public interest* a sufficient basis for standing under the Administrative Procedure Act. To justify this novel theory of standing the Sierra Club looks to the issue to be litigated, diverting attention away from itself. It warns that if it is denied standing many types of lawless administrative action will remain beyond the reach of justice. This approach was rejected in *Flast v. Cohen*: "the fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and *not on the issues he wishes to have adjudicated.*"[17]

The Sierra Club has tried to gloss over this lack of personal interest by misstating the *Data Processing* holding. It erroneously contends that, "With or without the benefit of an express statute providing for judicial review, a person 'arguably within the zone of interests protected by a statute' has standing to seek review of an administrative decision based upon the statute," (B. 29). The Sierra Club recites only half of the *Data Processing* holding. A party within the "zone of interests" has standing only if it can first show it is "injured in fact." A party such as the Sierra Club relying upon *Data Processing* must fulfill *both* requirements.

The plaintiffs in *Data Processing* and in its companion case, *Barlow v. Collins,* 397 U.S. 159 (1970), satisfied both conditions. In *Data Processing* computer service organizations whose competitive positions were directly threatened had standing because one of the purposes of the revelant

17. 392 U.S. 83, 99 (1968). (Emphasis added.)

statute, the Bank Service Corporation Act of 1962, 12 U.S.C. § 1864, 76 Stat. 1132, was to protect the economic interest of potential competitors from bank expansion into new markets. In *Barlow v. Collins,* plaintiffs were tenant farmers challenging regulations of the Secretary of Agriculture which would have increased the farmers' economic dependence on their landlords. Here again, plaintiffs were held to have standing since their injury was palpable and the statute, the Food and Agriculture Act of 1965, 7 U.S.C. § 1444(d)(10), 79 Stat. 1196, expressly directed the Secretary to protect the tenants' interests.

The Sierra Club not only lacks the personal interest in the outcome of the suit required to satisfy the *Data Processing* requirement of injury in fact, but it also does not fall within the zone of interests of any relevant land management statute. Because it is unable to identify any statute passed to protect its particular preferences, the Sierra Club has made an elaborate argument that it is within the protection of the entire "Conservation Code." There is no such thing as a "Conservation Code." The land management statutes found in Title 16 of the United States Code were passed at different times over several decades for many different purposes. Calling them the "Conservation Code" does not create a zone of interests to give the Sierra Club standing to challenge each section from internal management provisions to park boundary descriptions.

Until recently there was no judicial authority for the Sierra Club's assertion that a plaintiff need have no interest of his own in the outcome of litigation. Professor Davis, writing in 1968 before *Data Processing,* found that a personal interest was the one consistent requirement in federal standing law:

> Even though the law of standing is so cluttered and confused that almost every proposition has some exception, *the federal courts have consistently adhered to one major proposition without exception: one who has no interest of his own at stake always lacks standing.*[18]

The case at bar gives this Court the opportunity to clear up any uncertainty surrounding standing to challenge administrative action under the Administrative Procedure Act, and to confirm that injury in fact, a direct and personal stake in the outcome of a suit, is required under the act. This test satisfies Article III and at the same time permits maximum access to the courts by parties injured by agency action. This injury need not be to a legal or economic interest. Injury to health and safety, to a constitutional interest, or recreational or aesthetic injury can be a sufficient basis for standing if it is an identifiable injury to an interest of the plaintiff distinct from persons in general.[19] Since the Sierra Club can show no such direct or personal interest in the outcome of this suit and is not within the

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18. Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601, 617 (1968).

19. Flast v. Cohen, 392 U.S. 83 (1968) and Baker v. Carr, 369 U.S. 186 (1962), (constitutional interest is freedom of religion and the right to vote); Alameda Conservation Ass'n. v. California, 437 F.2d 1087 (9th Cir. 1971) (aesthetic and recreational injury); Crowther v. Seaborg, 312 F. Supp. 1205 (D. Colo. 1970) (health and safety, atomic testing). Though "injury in fact" is generally economic, other interests can be protected as well. This Court so indicated in *Data Processing* when, *in dicta,* it stated that "aesthetic, conservational, and recreational" values could at times be the basis for standing, 397 U.S. at 153. It is interesting to note, however, that the two examples cited, Scenic Hudson Preservation Conf. v. F.P.C., 354 F.2d 608 (2d Cir. 1965) and United Church of Christ v. F.C.C., 359 F.2d 994 (D.C. Cir. 1966) were both "private attorney general" suits where the decisions rested on an explicit provision in a regulatory statute rather than any finding of "injury in fact". See text accompanying notes 19-34 *infra.*

zone of interests of any relevant statute, it should be denied standing.

B. The Sierra Club Does Not Have Standing as a Private Attorney General.

Though the Sierra Club can demonstrate no basis for standing to assert its own interest, it seeks to champion the "public interest" in conservation. It asks this Court to ordain it "Guardian ad Litem" of the public lands, urging, "it is unlikely that lawless administrative action will be judicially reviewed and corrected unless at the behest of some organization acting as 'private attorney general'" (B. 19).

The Sierra Club's brief fails to distinguish between standing based on a party's personal stake in the outcome of a suit and standing to assert the public interest, but it is apparent that the Club has relied primarily on a private attorney general theory of standing. It does not claim that the court of appeals erred in failing to find it "injured in fact." It does contend, however, that the court should have permitted it to litigate the public interest as a private attorney general (B. 25-26).

In arguing that it has standing as a private attorney general, the Sierra Club has erroneously relied on cases where the plaintiffs did suffer a direct or personal injury.[20] These

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20. For example, the Sierra Club relies on both Association of Data Processing Service Organization v. Camp, 397 U.S. 150 (1970) and its companion case, Barlow v. Collins, 397 U.S. 159 (1970). In each of these cases this Court found that the plaintiffs were injured in fact, see n.15, *supra*. Also, in each case this Court distinguished the situation where a petitioner asserts only the public interest. In *Data Processing* this Court found the private attorneys general theory of standing "inapplicable to the present case", 397 U.S. at 153 n. 1. The concurring opinion in *Barlow* stated: "The plaintiffs in the present cases alleged distinctive and discriminating harm, obviously linked to agency action. Thus, I do not consider what must be alleged to satisfy the standing requirement by parties who have sustained no special harm themselves but sue rather as taxpayers or citizens to vindicate the interests of the general public," 397 U.S. at 172 n. 5.

cases hold only that a party who has standing to assert his own interest can also argue to the court that the public interest will be adversely affected.[21] In a true "private attorney general" action, the petitioner has no direct or personal interest in the outcome; he bases standing solely on his representation of the public interest.[22]

This Court has recognized that Article III can be satisfied by a party without a direct or personal interest under a "private attorney general" theory. The Second Circuit in *Associated Industries v. Ickes,* 134 F.2d 694, 704 (2d Cir. 1943), first announced the doctrine and explained how it is reconciled with Article III:

> While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with

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21. For example, in *Data Processing* after holding that a competitor is injured in fact, this Court went on to say, "Certainly he who is 'likely to be financially injured' . . . may be a reliable attorney general to litigate the issue of the public interest in the present case," 397 U.S. at 154.

Davis also has made this distinction: "Although one cannot gain standing by asserting that another private party is adversely affected or that the public is adversely affected by the challenged action, any party to a proceeding properly commenced may argue that a non-party or the public will be adversely affected by the assertedly illegal decision," Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601, 630 (1968). (All italicized in original.)

22. *Cf.,* Scripps-Howard Radio, Inc. v. F.C.C., 316 U.S. 4, 14 (1942), "these private litigants have standing only as representatives of the public interest."

> authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceeding, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private attorney generals. 134 F.2d at 704.

The main condition the *Associated Industries* case imposes on parties invoking the private attorney general status is that there be a Congressional grant of standing. Mr. Justice Harlan has explained that this requirement is based in part upon the doctrine of separation of powers:

> This Court has previously held that individual litigants have standing to represent the public interest, despite their lack of economic or other personal interests, if Congress has appropriately authorized such suits. . . . I would adhere to that principle. Any hazards to the proper allocation of authority among the three branches of the Government would be substantially diminished if public actions had been pertinently authorized by Congress and the President. I appreciate that this Court does not ordinarily await the mandate of other branches of the Government, but it seems to me that the extraordinary character of public actions, and of the mischievous, if not dangerous, consequences they involve for the proper functioning of our constitutional system, and in particular of the federal courts, makes such judicial forbearance the part of wisdom.

> It must be emphasized that the implications of these questions of judicial policy are of fundamental significance for the other branches of the Federal Government. *Flast v. Cohen,* 392 U.S. 83, 131-33 (1968) (dissent). (Footnotes and citations omitted.)

Congressional authorization of such suits in regulatory statutes also helps the courts to identify the "public interest" by specifying the particular values an agency must protect.

One of the best examples of the application of this theory is *Scenic Hudson Preservation Conference v. Federal Power Commission,* 354 F.2d 608 (2d Cir. 1965), *cert. denied* 384 U.S. 941 (1966).[23] In that case, conservation organizations sought standing under Section 313(b) of the Federal Power Act, 16 U.S.C. § 825e(b):

> Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals. . . .

The Second Circuit held that the plaintiffs' assertion of the public interest in aesthetic values, conservation and recreation was sufficient for standing under that Act. In *United Church of Christ v. F.C.C.,* 359 F.2d 994 (D.C. Cir. 1966), the court recognized plaintiffs' standing to represent the interests of the listening audience under Section 402(b)(6) of the Federal Communications Act, 47 U.S.C. § 402,

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23. Though the court did say that the plaintiffs showed a "special interest," 354 F.2d at 616, and indicated that one group would suffer economic loss as well, the court neither specifically identified all the plaintiff organizations nor linked any particular plaintiff with any particular issue. In fact the court referred to the plaintiffs' "representation of the common interest." Therefore this decision is better explained as a private attorney general suit arising under the Federal Power Act than one which turned on any "injury in fact" to the plaintiffs.

which allows appeals by persons "aggrieved or whose interests are adversely affected" by the Federal Communications Commission.

In both cases, Congressional authorization of the assertion by private parties of the public interest was implied by the court from the standing provision of a specific regulatory statute.[24] This Court too has recognized that standing to assert the public interest "rests on an explicit provision in a regulatory statute conferring standing."[25] There is no such regulatory statute to confer standing on the Sierra Club. The land management statutes at issue contain no special standing or review provisions; planning statutes in general do not authorize such suits.[26]

Lacking the foundation of specific Congressional authorization, the Sierra Club asks this Court to find that Congress authorized it to vindicate its view of the public interest as a private attorney general under Section 10(a) of the Administrative Procedure Act, 5 U.S.C. § 702. To support this the

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24. Other such regulatory statutes include: § 9(a) of the Securities Act of 1933, 15 U.S.C. § 77i(a), "person aggrieved"; § 24(a) of the Public Utility Holding Co. Act of 1934, 15 U.S.C. § 79x(a) "person aggrieved"; § 701(f)(1) of the Food, Drug and Cosmetic Act, 21 U.S.C. § 371(f)(1), persons "adversely affected"; § 1(20) of the Interstate Commerce Act, 49 U.S.C. § 1(20), "any party in interest".

25. Association of Data Processing Service Organization, Inc. v. Camp, 397 U.S. 150, 153, n. 1 (1970).

26. There have been various Congressional proposals to change this. See H.R. 49, H.R. 5074, H.R. 5075, H.R. 5076, H.R. 8331 and S. 1032 (all 92d Cong., 1st Sess. 1971) which would give private citizens standing to challenge agency decisions affecting the environment. These bills are similar to Michigan's Environmental Protection Act of 1970, MICH. COMP. LAWS ANN. §§ 691.1201-07, which provides that any government agency, "Person", or "legal entity" may seek equitable relief against any other governmental agency, "person", or "legal entity for the protection of the air, water, or other natural resources and the public trust therein from pollution, impairment or destruction."

Sierra Club argues that the term "aggrieved" under Section 10(a) means the same as "aggrieved" in particular regulatory statutes. Congress did not authorize such a broad grant of standing. The Administrative Procedure Act, unlike specific regulatory statutes, applies to *all* administrative agencies[27] and Section 10(a) was not intended to make every citizen a private attorney general to police every administrative activity. A grant of universal standing to private attorneys general would be repugnant to any notion that the Administrative Procedure Act "reflects existing law."[28]

There is no reason to think "aggrieved" within one statutory framework must mean the same as "aggrieved" within another. Historically, courts have treated standing provisions in regulatory statutes differently from those in the Administrative Procedure Act though the wording is similar.[29]

The "aggrieved" provisions which have been the basis of private attorney general suits are contained in statutes which regulate adjudicatory agencies,[30] agencies which hold administrative hearings in the regular course of their business. These provisions generally permit participants in

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27. Professor Jaffe has commented on this distinction:
[There is] no question that it may be appropriate that *particular statutes* enable anyone, . . . to invoke the discretionary jurisdiction of a court even without regard to 'grievance' . . . But is there a case in the federal system for an across-the-board grant of such jurisdiction? Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 HARV. L. REV. 255, 288-89, n.99 (1961).

28. The statute as enacted conforms to the draft which came out of conferences between the Government and the American Bar Association. The Attorney General stated to Congress: "this reflects existing law." S. Doc. No. 248, 79th Cong., 2nd Sess. 310 (1946).

29. See text accompanying notes 11-14, *supra*.

30. See note 24, *supra*.

these hearings to obtain judicial review of the final agency decision.

The Federal Power Commission is an adjudicatory agency, and the Federal Power Act gives the right to seek review to *"parties aggrieved,"* not persons aggrieved. Congress intended to give more persons standing to appear at hearings before the Commission, and to insure that *parties* could obtain judicial review. Other parts of the act however, insure that administrative efficiency is safeguarded. Under the act the Commission itself controls through regulations who can be parties.[31] Similarly, under the Federal Communications Act in *United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. 1966), the court enlarged standing before the Federal Communications Commission by allowing interested non-parties to intervene. The court emphasized that the administrative process need not be obstructed or overwhelmed because the Commission could develop formal standards to regulate and limit public intervention in Commission proceedings.[32]

The National Park Service and the U.S. Forest Service, on the other hand, are agencies concerned primarily with land management and planning, not adjudication. The land management statutes which give them authority to carry out Congressional programs do not provide for review of these decisions by the general public. Indeed it is difficult to see how a court could review such decisions absent a special Congressional mandate:

> Adjudication is the ordinary business of the courts and they are well-equipped to oversee an agency's performance of this work. But what can a court do when it is asked to review agency planning? . . . Courts are out

31. See Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608, 617 (2d Cir. 1965), *cert. denied* 384 U.S. 941 (1966).

32. 359 F.2d 994, 1005 (D.C. Cir. 1966).

of their element when they try to pass on the merits of policy judgments.[33]

Since land management statutes do not provide for review, they do not contain the customary safeguards which protect adjudicatory agencies from abuse. While adjudicatory decisions often affect only a narrow class of persons, management and planning decisions have a broader impact. If this Court adopts the Sierra Club argument, every member of the public could be a potential plaintiff to challenge each land management decision.[34]

The Administrative Procedure Act applies to *all* agencies and Section 10(a) refers to all *persons* aggrieved. A Congressional intent that more persons have standing in Federal Power Commission or Federal Communications Commission adjudicatory proceedings does not necessarily reflect an intent that any person should be permitted to obtain judicial review of all final agency decisions—adjudicatory, regulatory and planning. To construe the Administrative Procedure Act as authorizing such suits would alter fundamentally the relationship of federal courts and administrative bodies. If there is a need for a change in the decision-making process in land management, a judicial amendment of Section 10(a) of the Administrative Procedure Act which would affect *all* the federal agencies is not the proper means to this end.

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33. Reich, *The Public and the Nation's Forests*, 50 CALIF. L. REV. 381, 403 (1962).

34. The Public Land Law Review Commission recommended that courts refrain from rethinking land management decisions at the behest of those who were not parties to administrative proceedings. It said: "to minimize the dilatory effects of court involvement, we recommend that in general the availability of judicial review be limited to those parties who participated in the administrative proceedings for which review is sought." ONE THIRD OF THE NATION'S LAND, *supra* note 10, at 257. (All italicized in original.)

If this Court affirms the judgment of the court of appeals it will not leave the public interest in prudent land management unprotected. More effective means than judicial review invoked by a "private attorney general" have been suggested to safeguard this interest.

The Sierra Club urges that standing for conservation organizations in cases such as the one at bar is "critically important to America" (B. 19). This is a gross exaggeration. Judicial review of planning decisions is necessarily limited because Congress has vested broad discretion in planning agencies. Professor Reich has observed:

> [I]t is far from clear that judicial review of a typical Forest Service or Park Service decision would have any importance even if it could be obtained. Courts cannot review the wisdom of agency decisions, but only the limited question of whether a given action was a proper exercise of the power granted by Congress. Given statutory authority as broad as the Multiple Use Act, it is hard to see how a court could overturn as 'unauthorized' any imaginable decision concerning policy or planning for the forests.[35]

What is needed in the area of land management is not more judicial review of *final* agency decisions, but more public participation in the decision-making process itself. Public input before agency decisions are reached does not hinder the effective administration of Congressional programs, yet assures that public opinion will be heard. This is the crux of the Sierra Club's petition:

> If the public interest is to have any meaningful representation in a decision which will have lasting and irreversible consequences for the disposition of public lands, then the Sierra Club or some comparable organization *must have the opportunity to be heard* (B. 34). (Emphasis added.)

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35. Reich, *supra* note 33, at 395-96.

The public already can participate in most agency rulemaking, because such participation is a matter of right under Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553.[36] Public participation in Interior Department rulemaking has often been unavailable because matters concerning "public lands" are exempt from the act's provisions. 5 U.S.C. § 553(a)(2). In recognition of the need for more public voice in land management the Department of the Interior itself has recently provided for public participation in its rulemaking similar to that insured under Section 553.[37]

Congress in enacting the various land management statutes has given the Departments of the Interior and Agriculture broad discretion in managing public lands. In exercising this discretion the administrators were well aware of the Sierra Club's views which were aired repeatedly at public hearings and in correspondence. The administrators rejected the Sierra Club's viewpoint. Contrary to the Sierra Club's entreaty, this Court should not sit as surrogate administrator to oversee this discretion at the request of a self-appointed private attorney general.

If the Sierra Club had suffered a direct or special injury, judicial review would be available. Where it claims no injury to itself, but only asserts its right to champion the

36. This section provides for general notice of the proposed rulemaking by publication in the Federal Register giving the time, place and nature of public rulemaking proceedings, reference to the legal authority under which the rule is proposed, and either the terms or substance of the proposed rule or a description of the subjects and issues involved. After such notice, interested persons have the opportunity to participate through submission of written data, views or arguments.

37. 36 Fed. Reg. 8336-37 (1971).

"public interest," this Court, absent a Congressional mandate, has a duty not to intervene.

At issue in this case is how much of the public lands will be barred to public use and who will make those decisions. Conservationists are not fungible. Some like birds, some like trees, and others like clean water. Some are hunters, some are fishermen, others are boating enthusiasts. Some like skiing, some surfing, and some the wilderness. The Sierra Club presently falls into this last category. It has a narrow bent, but attempts to enfold all conservation, and indeed all the "public interest" under its protective wing.

The citizens of Tulare County feel that the Mineral King development is in the public interest because it will provide badly needed public recreational facilities in a nonwilderness area. They do not want the Sierra Club's "protection." They do not believe it appropriate for this Court to designate any club which is attempting to vindicate its particular corporate philosophy as the "Guardian ad Litem" of the public lands.

II. THERE IS NO STRONG LIKELIHOOD OR REASONABLE CERTAINTY THAT THE SIERRA CLUB WILL PREVAIL ON THE MERITS.

A. The Ninth Circuit Applied the Correct Standard for Preliminary Injunction.

The Ninth Circuit correctly held that the Sierra Club failed to show a "strong likelihood or 'reasonable certainty' " that it would prevail on the merits, and it properly found that it was an abuse of discretion to grant the preliminary injunction.

The standards for determining whether a preliminary injunction should issue are well settled. "The award of a preliminary injunction is an extraordinary remedy, and

will not be granted except upon a clear showing of probable success and possible irreparable injury," *Clairol, Inc. v. Gillette Co.*, 389 F.2d 264, 265 (2d Cir. 1968). A trial judge must also consider the inconvenience that an injunction will cause the opposing party and weigh the public interest. *A Quaker Action Group v. Hickel*, 421 F.2d 1111, 1116 (D.C. Cir. 1969). These guidelines for determining whether to issue a preliminary injunction were summarized in *Virginia Petroleum Jobbers Assn. v. F.P.C.*, 259 F.2d 921 (D.C. Cir. 1958), and are used in all circuits today.[38]

In this case, the Sierra Club argues that the district court was not required to use the *Virginia Petroleum* standards.[39] Citing *Hamilton Watch Co. v. Benrus Watch Co.*,

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38. See, e.g., Intercontinental Container Transport Corp. v. New York Shipping Ass'n., 426 F.2d 884, 886 (2d Cir. 1970); Bayless v. Martine, 430 F.2d 873, 877 (5th Cir. 1970); First-Citizens Bank and Trust Co. v. Camp, 432 F.2d 481, 483 (4th Cir. 1970); Crowther v. Seaborg, 415 F.2d 437, 439 (10th Cir. 1969); Garlock, Inc. v. United Seal, Inc., 404 F.2d 256, 257 (6th Cir. 1968); Nelson v. Miller, 373 F.2d 474, 477 (3d Cir. 1967).

39. Petitioner contends that the standards set out in *Virginia Petroleum* apply only to cases which involve motions for stays of administrative decisions pending appeal, and not to cases involving motions for preliminary injunctions (B. 41-42). The ostensible rationale is that in the former case the stay is sought after the plaintiff has lost on the merits whereas in the latter case the plaintiff has had no opportunity to be heard on the merits. This distinction is a wholly wishful one, quite unsupported by any authority. It is conclusively refuted by the many recent cases which have applied the *Virginia Petroleum* tests to motions for preliminary injunctions. See Intercontinental Container Transport Corp. v. New York Shipping Ass'n., 426 F.2d 884 (2d Cir. 1970); Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir.), *cert. denied* 394 U.S. 999 (1969); Packard Instr. Co. v. Ans Inc., 416 F.2d 943 (2d Cir. 1969); Garlock, Inc. v. United Seal, Inc., 404 F.2d 256 (6th Cir. 1968). See also Grier v. Bowker, 314 F. Supp. 624 (S.D.N.Y. 1970); Newman v. Holdbeam, Inc., 319 F. Supp. 1389 (S.D.N.Y. 1970).

206 F.2d 738 (2d Cir. 1953), the club contends that since it allegedly showed that irreparable harm was imminent a different rule applies; it was not required to demonstrate that it was likely to prevail on the merits, but merely to raise questions, "going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." 206 F.2d at 740.

In so arguing, the Sierra Club misrepresents the holding of *Hamilton Watch* and misstates the facts of this case. *Hamilton Watch* did *not* hold that proof of probable success may be dispensed with whenever the moving party shows that there is a risk of irreparable harm if the injunction does not issue. What *Hamilton Watch* did hold was that the burden of showing probable success is reduced when "the other elements are present (i.e., the *balance* of hardships tips decidedly toward plaintiff) . . ." 206 F.2d at 740. (Emphasis added.) To tip this balance "decidedly" in petitioner's fav r, it must be shown: (1) that imminent and irreparable harm would result were the injunction denied and (2) that this harm would heavily outweigh the adverse effects upon the defendant and the public from the grant of the injunction.

The Sierra Club could not show that the harm which it would have suffered in the absence of injunctive relief so heavily outweighed that which others would and did suffer as a result of its issuance, that the balance of hardships tipped decidedly in its favor.[40] Yet only upon such a showing may a court require less than a reasonable certainty that the moving party will prevail on the merits. The Ninth Circuit was on firm ground in holding the Sierra Club to the test laid down in *Virginia Petroleum Jobbers*

40. See text accompanying notes 103-105, *infra*.

Assn. v. F.P.C., 259 F.2d 921 (D.C. Cir. 1958), a test which it could not meet.

B. The Secretary of Agriculture Acted Properly.

The Sierra Club has challenged the decision of the Secretary of Agriculture to provide public recreational facilities at Mineral King.

Administrative decisions, including land management decisions,[41] are judicially reviewable in the absence of "clear and convincing evidence" of legislative intent to the contrary. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). However, the Sierra Club has confused the issue of standing with reviewability.[42] The *scope* of review to be given to an agency decision at the instance of a party properly before the court is different from the right to seek review in the first place.

The Sierra Club should heed the concurring opinion in *Barlow v. Collins*, "When agency action is challenged, standing, reviewability and the merits pose discrete, and often complicated issues which can best be resolved by

41. See, e.g., Jones v. Freeman, 400 F.2d 383 (8th Cir. 1968); Udall v. Washington, 398 F.2d 765 (D.C. Cir.), *cert. denied*, 393 U.S. 1017 (1969); McMichael v. United States, 355 F.2d 283 (9th Cir. 1965).

42. In its brief the Sierra Club argues that the Ninth Circuit has misplaced the burden of establishing standing, arguing that "only upon a showing of 'clear and convincing evidence' of contrary legislative intent should the courts restrict access to judicial review" (B. 31). It bases this argument on two cases, *Abbott* and *Data Processing*. In both cases this court referred to a presumption favoring the *reviewability* of agency decision.

In *Abbott* standing was not in issue. This Court was asked to interpret Section 702 of the Administrative Procedure Act which immunizes agency action "committed by law to agency discretion" from judicial review. It emphasized that reviewability of agency decisions is presumed unless there is clear legislative intent to the contrary. Similarly, in *Data Processing* this Court referred to this presumption of reviewability. There is no such presumption of standing.

recognizing and treating them as such." 397 U.S. 159, 170 (1970).

The type of review to be given an administrative decision has been clearly articulated by this Court in its recent decision, *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971). The first inquiry of the reviewing court will be whether the administrator has acted within the scope of his authority.

Next the court will decide whether the administrator has abused his discretion. An administrator's decision is given a strong presumption of regularity. Although complete immunity from review is disfavored, the scope of judicial review of discretionary administrative decisions is necessarily limited to minimize the conflict between the judicial process and administrative process.[43] "To demand that courts give full review whenever a complainant utters the formula 'abuse of discretion' is to hazard a serious misallocation of judicial resources as well as a stifling of agency and congressional programs."[44]

This Court in *Overton Park* laid down a standard for judicial review of discretionary administrative decisions which strikes a balance between immunity from review and *de novo* review of all decisions:

> Section 706(2)(a) requires a finding that the actual choice made was not 'arbitrary, capricous, an abuse

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43. Professor Jaffe has warned of "the dangerous tendencies of applying relaxed notions of standing without restrictive notions of a judicial discretion such as will allow the court to give paramount weight to administrative discretion of both a procedural and substantive character." Jaffe, *Standing to Secure Judicial Review: Private Actions,* 75 HARV. L. REV. 255, 285 (1961).

44. Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion",* 82 HARV. L. REV. 367, 375 (1968).

> of discretion, or otherwise not in accordance with law.' To make this finding the court must consider *whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.* . . . the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. 401 U.S. 402, 416 (1971). (Citations omitted and emphasis added.)

Finally, the reviewing court under *Overton Park* will look for procedural errors.

To support the issuance of a preliminary injunction in this case, then, the Sierra Club had to demonstrate a strong likelihood or reasonable certainty that the Secretary of Agriculture exceeded the scope of his authority, abused his statutory discretion or was in procedural error. The Ninth Circuit correctly determined that the Club did not meet this burden.

1. The Secretary Of Agriculture Has Authority To Combine Term And Revocable Permits For Recreational Areas Exceeding 80 Acres.

Under the terms of the preliminary permit issued by the Forest Service to Disney in February, 1966, the Forest Service proposes to issue combined permits to Disney: a 30-year term permit covering approximately 66 acres of land, and a non-exclusive revocable permit covering approximately 250 acres (A. 166). The revocable permit will actually be a special use permit, which is renewable annually and terminable at the discretion of the Forest Service at any time. 36 C.F.R. 251.1.

Congress has authorized both types of permits. The authority of the Secretary of Agriculture to grant annual special use permits (so-called "revocable" permits) lies

in the Act of June 4, 1897, 30 Stat. 34. That act authorizes the Secretary to make "rules and regulations" for the "occupancy and use" of the national forests, 16 U.S.C. § 551, and his authority to grant use permits pursuant to this section has been confirmed by this Court and by the Attorney General. *United States v. Grimaud,* 220 U.S. 506 (1911); 25 Ops. Att'y Gen. 470 (1905). "Several thousand" such revocable permits were granted within the first few years following the 1897 act. Permanent structures, some "costing several million dollars"[45] were built under revocable permits. The Secretary wanted to encourage construction of well built facilities and, in 1914, asked Congress for authority to grant term permits giving the security of tenure necessary to obtain financing:

> There is at the present time some hesitancy on the part of persons who want to use national forest land to construct summer residences, hotels, stores and other structures involving a large expenditure, because of the indefinite tenure of the permits to them which the present law provides for. At the present time, however, there are several thousand such [revocable] permits in use, upon which structures have been erected. In justice to those who desire to construct more substantial improvements, it is believed that the present law should be amended to give persons a better right than the revocable permit now authorized. H.R. Rep. No. 1023, 63d Cong., 2d Sess. 2 (1914).

In 1915 Congress gave the Secretary authority to grant term as well as revocable permits. Act of March 4, 1915, 38 Stat. 1086, 1101, 16 U.S.C. § 497. Term permits were limited to five acres, but there was no acreage limit on

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45. Testimony of Henry S. Graves, Chief Forester, *Hearings on H.R. 13679 Before the House Committee on Agriculture,* 63d Cong., 2d Sess. 306 (1914).

revocable permits. "[The Secretary of Agriculture] can issue terminable permits for 80 acres or 800 acres. The Secretary cannot guarantee certainty of tenure for more than five acres."[46] Five acres were enough to satisfy individuals building summer homes or lodges, but as the need for larger recreational facilities became acute,[47] amendments to the 1915 act increasing the allowable acreage and duration of term permits were sought by the Secretary to make financing more readily available: "The alternatives would be either for the Government itself to go into the hotel, camp and amusement business, which would be practically unthinkable, or else create the conditions under which private individuals, under proper control and legal limitation, could supply the service."[48]

Although the Secretary's request was unheeded for decades, in 1956 Congress responded. It amended the 1915 Act to increase the acreage allowable under term permit to 80 acres and to expand the purposes for which a term permit could be granted to include commercial development.

The Sierra Club interprets the 1956 enlargement of the Secretary's term permit authority under Section 497 as an

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46. Testimony of L. F. Kneipp of the Forest Service, *Hearings on S. 773 Before a Subcommittee of the House Committee on Agriculture*, 72d Cong., 2d Sess., ser P, at 21 (1933). Earlier, in 1931, R. Y. Stuart of the Forest Service stated that for revocable permits there is "no area limitation by law and some are considerably more than 160 acres", *Sundry Hearings on Certain Bills Before the House Committee on Agriculture*, 71st Cong., 3d Sess., ser. V, at 66 (1931).

47. Recreation was the stimulus behind the move to amend the Act of 1915: "[T]he main purpose behind this particular legislation is to permit further development of recreational facilities by commercial activities, which would facilitate the further use and occupancy of the national forests," Rep. Hope, *Hearings* (1933), *supra* note 46, at 6.

48. L. F. Kneipp, *Hearings* (1933), *supra* note 46 at 11.

implied limitation of the Secretary's authority to grant revocable permits. In fact, the only purpose of this amendment was to broaden the Secretary's power to issue term permits; Congress in no way intended to limit his power to grant revocable permits.[49] The House Agriculture Committee report on the 1956 amendment reflected an awareness of existing administrative practices. It indicated that Congress did not want to disturb the Secretary's basic authority to issue revocable permits under the 1897 Act, but rather was expanding his authority to issue term permits under the 1915 Act:

> The Department of Agriculture now has adequate authority to issue revocable permits for all purposes under the act of June 4, 1897 (16 U.S.C. 551). Its authority to issue term permits . . . would be broadened by S.2216. . . . H.R. Rep. No. 2792, 84th Cong., 2d Sess. (1965).

The Sierra Club further contends that Section 497 limits the size of privately financed recreational developments in national forests to 80 acres. It argues that the Secretary has no power to combine term and revocable permits for developments aggregating more than 80 acres. Combining term and revocable permits is a long-established administrative practice of the Department of Agriculture. Since the power to issue term permits was first granted in 1915, the Secretary has often exercised it in conjunction with his power to issue revocable permits. Term permits are

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49. The Secretary already had the power to authorize use of Forest Service land. The amendment was to give him power to grant more secure tenure for such use. This was emphasized years earlier by L. F. Kneipp, *Id.* at 21, "The Secretary of Agriculture now has full authority to do *everything* that will be done under this bill, except to definitely bind the Government for a period of years." (Emphasis added.)

issued for major facilities when definite tenure is needed. A supplemental revocable permit is also issued if more land is required. In 1931 the Forest Service described this practice in testimony before the House Committee on Agriculture:

> Experience has proved that 5 acres is insufficient to permit of the proper development of the most modern types of outdoor camps, hotels, resorts, sanitoria, etc. which, in addition to the principal structures, usually require the related use of lands for the various necessary utilities, recreational services, etc. now regarded as essential to establishments. At present these are provided by the issuance of supplemental terminable permits, which injects an undesirable element of uncertainty of tenure and adds to routine requirements of administration

Again in 1933 in a hearing before the House Committee on Agriculture, the Forest Service testified:

> The only way we can meet the situation is to give them a term permit for the 5 acres upon which the main buildings are situated, definitely securing that part of the project, and to then give them a terminable permit for the remainder of the area, upon which there is no statutory limit. The Secretary of Agriculture can give a terminable permit for as much land of that type as may be necessary.[51]

Congress was advised of this administrative practice repeatedly.[52]

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50. Testimony of Major R. Y. Stuart, *Hearings* (1931), *supra* note 46, at 62.

51. Testimony of L. F. Kneipp, *Hearings* (1933), *supra* note 46, at 15.

52. CONGRESSIONAL REPORTS: S. REP. No. 754, 72d Cong., 1st Sess. (1932). CONGRESSIONAL HEARINGS: *Sundry Hearings on Cer-*

In House hearings in 1947 it was recognized that major facilities in ski resorts would almost always exceed the 5-acre limit on term permits:

> Another type is the ski lifts which are installed under permits on many of our high country winter sports areas. The ski lift itself, extending up the hill, with suitable space at each end for necessary structures to operate it, and a place to sell tickets and what not—and on most of our winter sports areas we need two or three of those . . . and there the aggregate acreage will almost always exceed 5 acres.[53]

In 1956 another Agriculture Department witness explained to the House Committee on Agriculture that winter sports resorts and other developments often were granted permits aggregating not only more than 5 acres but even more than 80 acres:

> We have many, many permits for summer homes, stores, resorts, hotels, all sorts of special uses. I have a list of them here, the type of things which average more than five acres. We have camp and picnic areas, with 17 acres. Those are summer camps . . . fish hatch-

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tain Bills Before the House Agriculture Committee, 71st Cong., 3d Sess., ser. V, at 62 (1931); *Hearings on S.773 Before a Subcommittee of the House Agriculture Committee,* 72d Cong., 2d Sess., ser. P, at 14-15 (1933); *Hearings on H.R. 1809 Before Subcommittee No. 2 of the House Agriculture Committee,* 80th Cong., 1st Sess. 3 (1947). AGRICULTURE DEPARTMENT REPORTS: *Report on S. 4166, 71st Cong., 2d Sess. (1930) to the Chairman, Senate Committee on Agriculture and Forestry* (Apr. 12, 1930); *Report on H.R. 11637, 71st Cong., 2d Sess. (1930) to the Chairman, House Agriculture Committee* (Apr. 21, 1930); *Report on S. 773, 72d Cong., 1st Sess. (1932) to the Chairman, House Agriculture Committee* (Dec. 17, 1932).

53. Testimony of C. M. Granger of the Forest Service, *Hearings Before Subcommittee No. 2 of the House Committee on Agriculture to Facilitate Use and Occupancy of National Forest Lands,* 80th Cong., 1st Sess. at 3 (1947).

> eries, 36 acres; fur farms, 78 acres; mill and factory sites, 48 acres; nurseries, 68 acres; *parks and playgrounds, 88 acres;* reservoirs, 75 acres; *rifle and target ranges, 400 acres; winter sports areas, 400 acres.*[54]

The Ninth Circuit correctly held that the 1956 amendment only increased the Secretary's term permit authority and did not detract from his power to issue revocable permits or to combine term permits and revocable permits:

> It seems apparent, as is obvious to both Senate and House committees that the eighty-acre long-term permit was a necessity to obtain proper financing for substantial permit improvement, while developments of less magnitude and permanency, such as trails, slopes, corrals, could be placed upon land held under revocable permit (A. 229).

This is also the way the Secretary has interpreted the 1956 amendment. He has continued to issue combined permits when necessary, but never grants term permits for over 80 acres. Eighty-four other ski areas have been developed on national forests under this type of arrangement. Many of them have combined term permits for less than 80 acres with revocable permits covering thousands of acres.[55] This well-established administrative practice is entitled to a strong presumption of validity. *Udall v. Tallman,* 380 U.S. 1 (1965).

The Secretary has the authority to issue revocable permits without any limitation on acreage, including the

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54. Testimony of Mr. Crafts of the Forest Service, *Hearings on General Committee Business Before the House Committee on Agriculture,* Vol. I, 44-45 (July 17, 1956). (Emphasis added.)

55. See Appendix, Brief for the United States Ski Association as Amicus Curiae. Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970).

authority to allow the Mineral King development to be built totally under revocable permit. Significantly, two major ski resorts have been built wholly on revocable Forest Service permits.[56] Combination of term and revocable permits merely makes it possible for the developer to obtain construction financing; it does not make the development illegal.

Contrary to the Sierra Club's contention, the Secretary of Agriculture has not combined term and revocable permits to circumvent an 80-acre "limitation." The history of this administrative practice reveals that the Secretary uses term permits only where absolutely necessary:

> The long-established practice of the Department of Agriculture is to restrict the area covered by special-use permits to the minimum consistent with the needs of the applicant. In the great majority of cases, the permitted areas would be greatly below the maximum established by the bill, which would be attained only when absolutely necessary to meet clearly established needs.[57]

In this case the Secretary proposes to issue a term permit, not for 80 acres, but only for about 66 acres because that is all that is needed to cover the major Mineral King facilities.[58] The supplemental permit will cover an area of approximately 250 acres where no structures will be located.

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56. Two ski resorts use public land under revocable special use permit only. Mount Snow in Green Mountain National Forest in New Hampshire represents a $2.9 million investment on 911 acres. Multipor Ski Bowl at Mount Hood National Forest in Oregon lies on 640 acres of public land with improvements of $800,000.

57. *Hearings* (1931), *supra* note 46, at 62.

58. This is not a case where, as the Sierra Club argues (B. 46) "The Secretaries are under pressure to commit public lands to commercial exploitation, both to justify budgetary requirements of their agencies and to please powerful and persuasive applicants for development permits." The Mineral King development was

The 1956 legislation was enacted to stimulate private investment in public recreational facilities in national forests. The Sierra Club must not be allowed to twist it into a device to block the Mineral King recreational area and to close dozens of other ski areas in western United States, virtually ending skiing as a permissible form of outdoor recreation west of Denver.[59]

The Sierra Club, although recognizing the Secretary's authority to issue revocable permits (B. 51) further argues that the revocable permit is invalid because it is neither "revocable" nor "terminable." The foundation for this remarkable argument is not the language of the permit itself—indeed by its very terms it is revocable at the

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contemplated by the Agriculture Department for over 20 years. Stimulus for the development came from the Department itself, which published a request for competitive bids, not from any private developer.

59. Most of the 84 ski areas presently on National Forest land holding combined term and revocable permits would be illegal if Section 497 were given the Sierra Club's strict construction. This was indicated in Department of Agriculture testimony in recent Senate Appropriation hearings:

> Question. Will this suit [Sierra Club v. Morton] have any effect on other facilities authorized by the Forest Service?
>
> Answer. There are 84 recreational facilities authorized in National Forests and based upon permits similar to those under attack in this suit. Depending upon the outcome of this suit, there could be some effect on the permits authorizing these facilities. If the outcome is favorable to the Government, the permits authorizing these facilities will not be affected. If the outcome is unfavorable, then each of these permits would be without authority and, therefore, would be illegal. Seven permits could be covered under existing authority, but the remaining 77 could not. These then would technically be in trespass, the facilities would have to be removed, and the sites restored. New legislation would be necessary to allow the continued occupancy of National Forest land. *Hearings on H.R. 9417 Before a Subcommittee of the Senate Committee on Appropriations,* 92d Cong., 1st Sess. 2922 (1971).

discretion of the Forest Service[60]—but the availability of the Forest Service appeal process to the terminated permittee. Under the Forest Service regulations appeal to the Board of Forest Appeals would be available.

This Board would not, as the Sierra Club argues, test the *grounds* for the decision but would decide only whether the contested decision was "contrary to, or in conflict with, the facts, law or the regulations of the Secretary of Agriculture."[61] The burden of establishing errors or omissions would rest on the complaining party.[62] Since the only protection the regulations afford a special use permittee under a revocable permit is that such permit "may be revoked or cancelled only by the Secretary of Agriculture or by an officer of the Forest Service superior in rank to the one by whom it was isued,"[63] such a superior officer could revoke the permit for any reason and still be upheld by the Board.

These regulations and appeal procedures do not in any way detract from the Forest Service's express contractual right to revoke the proposed permit. If the Sierra Club's position were sound, since all denials of permits are appealable, *no* Forest Service permit would ever be revocable. This is clearly unreasonable.

The Sierra Club further questions whether revocable permits to use land on which permanent structures are built are in fact revocable. Expensive improvements have been

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60. Section 15 of the proposed permit (A. 24) deals with termination stating "this permit may be terminated upon breach of any of the conditions herein or at the discretion of the Regional Forester or the Chief, Forest Service." A permit "terminable at the discretion" of a party is revocable at will.

61. Forest Service Regulations, 36 C.F.R. § 211.21.

62. *Id.* § 211.24.

63. *Id.* § 251.1.

erected on Forest Service land under revocable permits for years. This practice was cited as early as 1914 by the Secretary of Agriculture who wrote that "several thousand" revocable permits were in use under which structures had been built.[64]

In 1930 Secretary of Agriculture Hyde noted:

> There has also been a consistent increase in the quality and value of the improvements constructed on these lands [National Forests] under the permits issued by this Department. Some of the hotels and resorts constructed under special-use permit represent investments in excess of $100,000, and many individual summer homes represent investments of $5,000. *Other developments are proportionately permanent and expensive.*[65]

At the present time there are two ski resorts built entirely under revocable Forest Service permits.[66] The fact that permanent or expensive structures are built under a revocable special use permit does not destroy the power of the Forest Service to revoke the permit in its discretion.

In this particular case, contrary to the Sierra Club's allegations, *no* permanent structures will be built at Mineral King under the proposed revocable permit. The garage and the ski lift towers will both be erected under the term permit. The revocable permit will include ski lift clearing, ski runs, and service road.[67] The proposed permits are in fact "terminable" and "revocable."

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64. H.R. Rep. No. 1023, 63d Cong., 2d Sess. 2 (1914).

65. *Agriculture Department Report on S. 5604,* 71st Cong., 3d Sess. to the Chairman, Senate Committee on Agriculture and Forestry, Jan. 29, 1931. (Emphasis added.)

66. See note 56, *supra.*

67. See note 6, *supra.*

2. The Secretary Of Agriculture Did Not Abuse His Discretion In Approving Public Outdoor Recreation In Sequoia National Game Refuge.

The Sierra Club contends that the Secretary of Agriculture abused his discretion when he approved of the Mineral King recreational area in Sequoia National Game Refuge. Under *Overton Park* this decision is entitled to a strong presumption of regularity and will not be overturned unless the Secretary failed to consider all relevant factors or his decision was clearly erroneous.

Section 6 of the 1926 legislation expanding Sequoia National Park designated Mineral King as a game refuge and prohibited "the hunting, trapping, killing or capturing of birds and game or other wild animals" at Mineral King except under regulations of the Secretary of Agriculture. 44 Stat. 818, 821, 16 U.S.C. § 688. Specifically contemplating multiple-use management of Mineral King the act continues:

> *Provided further,* That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established.

The purposes for which the game refuge was established were stated in the act:

> *Provided,* That it is the purpose of this section *to protect from trespass the public lands* of the United States *and the game animals* which may be thereon, and not to interfere with the operation of the local game laws as affecting private or State lands. (Emphasis added.)

In 1924 hearings the Chief of the Forest Service explained these purposes, stating that hunting should be prohibited at Mineral King for three reasons:

—to increase the deer herds,
—to prevent poaching across park boundaries, and
—to keep the people who use the area for recreation from being shot.

He said:

> The third reason is that in the vicinity of Mineral King is quite an intensely developed recreational area under national forest administration. There are a good many campers in there. There are a good many summer home permits held by people who have constructed summer cabins and who take their families up there for the entire season, and on account of that intensive recreational development we think it is preferable to exclude hunting from the region. *Hearings on H.R. 4095 Before the House Public Lands Committee,* 68th Cong., 1st Sess. 24 (1924).

The Secretary of Agriculture Considered All Relevant Factors.

There is scant likelihood that the Sierra Club could prevail on its assertion that the Secretary of Agriculture abused his discretion by deciding to permit outdoor recreation at Mineral King. This was no hasty decision. Development of a ski area has been under consideration for over twenty years. In 1949 the Secretary established the Mineral King Recreation Area and sought private capital for the construction of facilities for skiing. In 1965 the Secretary again sought capital for construction of public recreational facilities at Mineral King.

The Secretary scrutinized every possible effect of recreational use on the Mineral King terrain and game be-

fore approving the master plan in February, 1969. Disney itself conducted extensive studies and surveys which were available to the Secretary including:

> [R]eports on ski area and resort planning; low and high altitude vertical photography and topographic mapping of Mineral King; detailed data on various rock and soil types, and geological conditions in the Village and proposed parking area; studies on sanitation, waste disposal, water systems, meteorology and avalanche control; studies on transportation systems to bar automobile traffic from the Mineral King Valley; and other substantial research and planning reports (A. 177).

Preparation of a master plan supported by such extensive investigations cost Disney over $750,000 (A. 177).

Within the Forest Service, the Division of Recreation consulted with the Range and Wildlife Management Division long before the master plan was prepared and approved (A. 130). In 1967 the Range and Wildlife Management Division was critical of some ecological aspects of the proposal. However it recognized "it is imperative to retain much of the original basic ecological uniqueness of this basin and that this is possible with careful, thoughtful planning" (A. 131).

The Secretary also considered the possible impact on fish (A. 129) and game (A. 142, 143). In announcing the master plan, the Regional Forester emphasized:

> Our goal is to provide a needed public service so that the scenic, aesthetic and recreational resources of Mineral King can be enjoyed by the American people as part of their heritage. At the same time, we intend to work with the Disney organization to insure that the development can be accomplished without *substantial impairment or permanent, undesirable, ecological impact* (T.R. 52). (Emphasis added.)

One of the road surveys summarized the consideration of all aspects of the Mineral King development:

> Outdoor recreation would be the primary benefit from the Mineral King development. With careful planning and supervision, soil losses would be minimal. Very little timber volume is within the right of way. No fishery resources are directly involved, and the highway parallels deer migration routes. Anticipated impact on fish and wildlife resources are minimal. . . . The proposed highway, as presently planned, would have no major adverse effects on the Sequoia National Forest and would make available a greatly enlarged recreation resources base to meet public needs.[68]

There Is No Clear Error of Judgment.

Federal land management statutes as a whole reflect a Congressional desire that public lands be administered to promote harmonious and coordinated management of their many resources. This is the spirit of the Multiple Use-Sustained Yield Act of 1960, 74 Stat. 215, 16 U.S.C. §§ 528-31, which catalogues the permissible uses of National Forest land: "outdoor recreation, range, timber, watershed, and wildlife and fish purposes," and of the act which declared Mineral King a game refuge, while encouraging its use for other compatible purposes. 44 Stat. 821, 16 U.S.C. § 688.

Recreation is a legitimate use of national forest land. It cannot be inconsistent *per se* with a game refuge[69]; all national parks are also game refuges and recreational use of such areas is encouraged. Winter sports resorts—

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68. Forest Service, *Mineral King Highway Impact Survey Report, Stage I*, April 1968 at 26.

69. 16 U.S.C. § 460k, 76 Stat. 653, specifically permits recreational use of areas within the National Wildlife Refuge System compatible with the purposes for which such areas were established.

ski areas—have been built entirely in national parks.[70] There is nothing about the designation of an area as a game refuge which subjects it to use restrictions more stringent than those applied in national parks.

Since recreational use of a game refuge is not *per se* arbitrary or capricious, it was improper for the trial court to enjoin recreational use of Mineral King unless the proposed development is so wholly inconsistent with the purpose of the Sequoia National Game Refuge as to overcome the strong presumption of regularity to which the Secretary's decision is entitled. The purpose of the Sequoia Game Refuge was to protect the game animals, primarily the herds of deer, to prevent poaching in the adjacent national park, and to protect vacationers who use the area. Since Mineral King is not a part of the park itself, Congress at least wanted to "perpetuate the protection now offered by the National Park."[71]

At present controlled hunting under state supervision is required to control the animal overpopulation in Mineral King. In 1926 when the Sequoia National Game Refuge was established the animals thought to need protection were bear and deer. Wildlife refuges, as tools to protect game, have now fallen out of grace with wildlife managers. On the Sequoia National Game Refuge, as on most other game refuges, controlled hunts are now allowed. Under the regulations of the California Department of Fish and Game both deer and bear are hunted in Mineral King today. The game management problem in Mineral King is not one of

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70. *E.g.*, the Badger Pass ski area is entirely within Yosemite National Park.

71. *Hearings on H.R. 9387 before the House Committee on Public Lands*, 69th Cong., 1st Sess. 58 (1926).

preserving the last remnants of vanishing species, but rather one of controlling population so that the animals will not, through overgrazing, destroy their habitat.[72]

The record shows the Secretary's consideration of all relevant factors, including the impact of Mineral King on fish and game. It was neither arbitrary nor clearly erroneous for the Secretary of Agriculture to approve of the Mineral King development knowing of the overpopulation of animals in the refuge and the urgent need for outdoor recreational sites. The Secretary merely followed the statutory mandate for multiple-use management to insure the balanced use of public lands. This decision is entitled to a strong presumption of validity. There was more than

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72. The area is now managed under a Master Cooperative Agreement between the Forest Service and the California Department of Fish and Game dated April 15, 1953, Forest Service Manual, § 2611.1, R-5, Supplement No. 37, amended 1964, and a Memorandum of Understanding Covering the Sequoia National Game Refuge, executed by the National Park Service and the Forest Service in October, 1965, and by the California Fish and Game Commission and the California Department of Fish and Game in January, 1966. The Memorandum of Understanding provides in part:

> WHEREAS, the investigations made by the Department, the Forest Service and the Park Service have shown that the deer population of the Refuge has increased to a level where these animals have caused damage to their range and depletion of valuable native species of vegetation on the adjoining Sequoia National Park and
>
> WHEREAS, there has been need to authorize and hold special deer hunts on the Refuge in order to reduce the deer population to a level in balance with the habitat, and there will continue to be a need to authorize deer hunting in order to remove surplus animals, and . . .
>
> WHEREAS, investigations made by the Department, the Forest Service, and the Park Service have shown that the bear population within the Refuge has increased to a level where these animals have caused damage to both Federal and private property within and adjacent to the Refuge and that there exists a need to control the number of bears within the Refuge . . . .

enough evidence to support the Ninth Circuit's finding that the Sierra Club was not likely to succeed on this issue: "We find no substance in this argument" (A. 234).

3. The Secretary of Agriculture Was Not Required to Make a Formal Finding.

The Sierra Club cites one alleged procedural error by the Secretary of Agriculture. It claims he has neglected to make a finding that recreation at Mineral King is consistent with the Sequoia National Game Refuge and argues that "This failure was an abuse of discretion" (B. 65).

This argument is similar to the one advanced by the plaintiffs in *Overton Park*. Plaintiffs there alleged that a formal finding was required by the Secretary of Transportation that there were no "feasible and prudent" alternatives to the selected road route. This Court in rejecting that contention held:

> Undoubtedly review of the Secretary's action is hampered by his failure to make such findings, but absence of formal findings does not necessarily require that the case be remanded to the Secretary. Neither the Department of Transportation Act nor the Federal Aid to Highways Act requires such formal findings.... And, although formal findings may be required in some cases in the absence of statutory directives when the nature of agency action is ambiguous, *these situations are rare*. Plainly, there is no ambiguity here, the Secretary has approved the construction of I-40 through Overton Park and has approved a specific design for the project. 401 U.S. 402, 417 (1971). (Citations omitted and emphasis added.)

In this case the Secretary of Agriculture was authorized to use game refuge lands for purposes "consistent with the purposes for which the game refuge is established," 16 U.S.C. § 688, but the statute requires no formal finding.

There is also no ambiguity in the Secretary's action; he has approved the Mineral King master plan and proposes to issue a 30 year permit to Disney. As in *Overton Park* it is not an abuse of discretion for him to act without a formal finding.

C. The Secretary of the Interior Acted Properly.

The Sierra Club has also challenged two administrative decisions of the Secretary of the Interior—the approval of a transmission line and of a road traversing Sequoia National Park to permit public enjoyment of Mineral King.

1. The Secretary of the Interior has authority to permit the construction of a power distribution line to serve Mineral King.

The Sierra Club contends that the 1926 legislation expanding Sequoia National Park prohibits the Secretary of the Interior from granting any right-of-way for electrical transmission and distribution lines through Sequoia National Park without first obtaining Congressional approval. Act of July 3, 1926, 44 Stat. 820, 16 U.S.C. § 45c.[73] This interpretation of Section 45c is untenable.

The purpose of Section 45c was to give the lands added to Sequoia National Park in 1926 the same protection that Congress previously had given all other national park lands against Federal Power Commission licensing of hydroelectric power generation facilities and associated primary transmission lines within their limits.

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73. The portion of Section 45c in issue contains the following prohibition:

> *Provided*, That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress.

The Secretary of the Interior has had specific authority since 1901 to grant revocable rights-of-way through Sequoia National Park for electrical plants, poles and lines.[74] In 1911 Congress also gave the Secretary power to grant term rights-of-way.[75]

In 1913 one of the most dramatic conservation battles of the century culminated with the passage of the Raker Act, Act of December 19, 1913, 38 Stat. 242, authorizing the City of San Francisco to construct Hetch Hetchy Dam and Reservoir within Yosemite National Park on the Tuolumne River. The memory of the Hetch Hetchy fight had not dimmed when, in 1920, the Federal Power Act[76] was passed, giving the Federal Power Commission authority to license hydro-electric power development projects on the public lands. This act was "the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources

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74. "The Secretary of the Interior is authorized and empowered under general regulations to be fixed by him to permit the use of rights-of-way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes. . . ." Act of February 15, 1901, 31 Stat. 790, 16 U.S.C. § 79.

75. "The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power. . . .", Act of March 4, 1911, 36 Stat. 1253, 16 U.S.C. § 5.

76. Act of June 10, 1920, 41 Stat. 1063 (1920). At that time the act was called the "Federal Water Power Act." The name was changed to the "Federal Power Act" in 1935. 49 Stat. 863.

of the nation, insofar as it was in the reach of the federal power to do so. . . ." *First Iowa Hydro-Electric Co-op v. Federal Power Commission,* 328 U.S. 152, 180 (1946).

The power of the Secretary of the Interior to grant rights-of-way under the 1901 and 1911 statutes was superseded by the Federal Power Act as to projects for the generation and transmission of hydro-electric power.[77] One year later Congress took some of this power away from its newly created Commission as well, protecting the national parks and monuments from hydro-electric intrusion by providing:

> [N]o permit, license, lease or authorization for dams, conduits, reservoirs, power houses, transmission lines or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits as constituted March 3, 1921, of any national park or national monument shall be granted or made without specific authority of Congress. 41 Stat. 1353, 16 U.S.C. § 797a (Supp. 1971).[78]

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77. The Federal Power Act created the Federal Power Commission and gave it jurisdiction to license "dams, water conduits, reservoirs, power houses, transmission lines or other project works . . .". Act of June 10, 1920, 16 U.S.C. § 797(e). Section 796(11) defines "project" as the:

> [c]omplete unit of improvement or development consisting of a power house, all water conduits, all dams and apurtenant works and structures . . . the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system. . . .

78. The reason for this amendment was explained by Representative Esch in introducing the bill. He testified:

> [T]he object of the bill is to modify the Federal Water Power Act so as to eliminate from its provisions national parks and monuments. When the Act was originally passed we supposed we had sufficiently safeguarded national parks and monuments so that there would not be constructed therein any water power or reclamation projects. However, the President was in doubt as to whether he would sign the bill which was

As a concession to the power interests this amendment applied only to national parks or national monuments "as constituted March 3, 1921."[79] Its applicability to new parks or additions to parks was to be decided by Congress at a later time:

> Should hereafter new parks or monuments be created by act of Congress, opportunity should be afforded Congress to declare whether or not such new parks or monuments should be subject to water power development, leaving to Congress instead of to the Federal Power Commission the right to say, or to what extent, such new national parks or monuments, or additions to existing parks or monuments, should be opened to water power development.[80]

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presented to him on the fourth day of June, the day before we adjourned. He referred the bill to the Secretaries of the Interior, War and Agriculture. The Secretary of the Interior had great doubts as to the policy of giving the commission control over the national parks and monuments in the matter of water power development. Senator Jones, Chairman of the Committee on Commerce and Senator Walsh of Montana, called upon the Secretary and conferred with him regarding the signing of the bill. The Secretary conferred with Secretary Underwood and the Majority Leader (Mr. Mondell) and an understanding was reached whereby the bill was to be introduced at this session eliminating the parks and monuments from the operation of the Federal Power Act, and this bill carries out this understanding. 60 CONG. REC. 4204 (1921).

See also, H. R. REP. No. 1299, 66th Cong., 3d Sess. 3 (1921).

79. In 1921 John B. Payne, Secretary of the Interior wrote to the House Committee on Interstate and Foreign Commerce agreeing to so limit the application of the Act:

> I saw no objection to limiting the proposed amendment to the power act . . . to existing parks and monuments. Several weeks ago a representative of the power interests called on me and stated that it would eliminate objection from those interests if the words "as now constituted" would be inserted. . . ., H.R. REP. No. 1299, 66th Cong., 3d Sess. 3 (1921).

80. H.R. REP. No. 1299, 66th Cong., 3d Sess. 2 (1921). In 1935 Congress redefined the jurisdiction of the Federal Power Commission to exclude all existing and future national parks and monu-

Sequoia National Park was expanded in 1926 to protect the Kern River basin from future development for power purposes.[81] Act of July 3, 1926, 44 Stat. 818. Since the 1921 amendment to the Federal Power Act applied only to *existing* national parks, its prohibition was incorporated into the 1926 act to "prohibit the development of hydro-electric power in the . . . enlarged park."[82] Thus, all Sequoia National Park was insulated from the threat of Federal Power Commission licensing of dams and power plants within its boundaries.

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ments. Act of Aug. 26, 1935, 49 Stat. 838, 16 U.S.C. § 796(2). In the period between 1920 and 1935, however, Congress was obliged to decide each time it added land to the national park system whether the Federal Power Commission licensing authority should extend to the new park area.

81. W. B. Greeley, Chief of the Forest Service testified:

> This proposed addition embraces some 600,000 acres. The striking topographic features of that area are three great canyons, chiseled out of the Sierras. These great canyons, Kern River and the South and Middle Forks of Kings River, are bound to be the principal routes of travel. One of the greatest attractions will be the canyons themselves, with their remarkable variety of topography.
>
> You cannot admit power development in canyons of that character, with artificial reservoirs and conduits, the erection of transmission lines, power dams, pipe lines, and all the rest of it, without largely destroying its natural character. *Hearings before the House Committee on Public Lands on H.R. 7452 to Add Certain Lands To Sequoia National Park,* 67th Cong., 2d Sess. 12 (1921).

Because of pending power applications, the area surrounding the Kings River, first proposed for inclusion in Sequoia National Park was not preserved until 1940 when it became Kings Canyon National Park. Act of March 4, 1940, 16 U.S.C. § 80. See H.R. REP. No. 583, 67th Cong., 2d Sess. 3 (1922): "The city of Los Angeles has on file with the Federal Power Commission applications for six power sites within this proposed new area. The San Joaquin Light and Power Corporation has applied for two sites." See also *Hearings Before the House Committee on Public Lands on H.R. 4095,* 68th Cong., 1st Sess. 2, 19, 21, 39, 87 (1924).

82. H. R. REP. No. 583, 67th Cong., 2d Sess. 2 (1922). See also *Hearings* (1921), *supra* note 81, at 9, 10, 14, 15, 23, 24.

Though the Federal Power Act superseded the Acts of 1901 and 1911 in part, it did not take away all of the Secretary of the Interior's power to license distribution and transmission lines over public lands. In *Pacific Power and Light Company v. Federal Power Commission*, 184 F.2d 272, 274-75 (D.C. Cir. 1950), the court held that the Federal Power Act restricted the Secretary's authority only over hydro-electric power projects. The court stated:

> [T]he purpose of Congress appears to have been to place in one agency authority over the development of the hydro-electric resources owned or controlled by the National Government, and would encompass the auxiliary facilities which are parts of those projects. But such a purpose would not necessarily encompass transmission lines or other facilities which are not parts of such projects. There would seem to be no necessity, for example, under the compulsion of that purpose, to take from the Secretary of the Interior authority to determine the use of public lands within his jurisdiction for a transmission line which is not a part of a hydro-electric project. Reservoirs, power houses and transmission lines merely as such were not the considerations which led Congress to pass the Act. The concern of Congress was in the development of water resources. . . . [U]nless the nature, purpose and function of the line is such as that it is a part of a power project, it does not fall within the statutory definitions which establish the authority of the Commission, and is not to be forcibly enveloped in the statutory language by the compulsion of a congressional purpose inadequately expressed.

Both the Secretary of the Interior and the Secretary of Agriculture have interpreted their authority under the 1901 and 1911 acts in this way. Both have promulgated regulations for the issuance of power line permits not falling

within the regulatory authority of the Federal Power Commission.[83]

There is no basis for the Sierra Club's contention that Section 45c requires Congressional authorization of all distribution or "high voltage transmission lines" (B. 80) in Sequoia National Park. If this restrictive interpretation were correct, Congressional approval of all power lines in all national parks and monuments as constituted in 1921 would be required under the 1921 Act, 16 U.S.C. § 797a. The Ninth Circuit recognized the "unlikely intention to require an act of Congress for each electrical line within the park" (A. 232).

The Secretary's administrative interpretation of Section 45c is reasonable and this Court should defer to it. "When faced with the problem of statutory construction, this Court

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83. A regulation of the Secretary of Interior states:

> Applications for hydroelectric power plant sites or rights-of-way from main or primary hydroelectric power transmission lines must be made to the Federal Power Commission, Washington, D.C. under the Act of June 10, 1920, as amended. Rights-of-way for transmission lines which are not primary lines must be secured under the Act of February 15, 1901, or the Act of March 4, 1911. 45 C.F.R. § 2234.4-1(3).

The Secretary of Agriculture has a similar regulation. 36 C.F.R. § 251.52 authorizes the Chief of the Forest Service to grant easements for certain types of transmission lines. Section 251.50 defines these transmission lines as follows:

> Transmission lines means the poles, towers, wires, insulators and all other structures, equipment, appliances and other facilities erected or to be erected when:
>
> (1) The transmitted energy is generated from other than water power,
>
> (2) The transmission line classifies as a *non-primary line* under the provisions of the Federal Power Act . . . because it does not transmit power from a water power plant or appurtenant works to a point of junction with the distribution system or with the inter-connected primary transmission system. (Emphasis added.)

shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman,* 380 U.S. 1, 15 (1965).

Application of the 1921 prohibition on F.P.C. licensing to the land added to Sequoia National Park in 1926 was the sole purpose of Section 45c. Congress did not intend to repeal the authority of the Secretary of the Interior to grant rights-of-way under the 1901 and 1911 Acts for distribution and transmission lines other than hydro-electric projects and primary transmission lines.[84] The legislative history, administrative practice and judicial interpretation of Section 45c confirm this. The proposed Mineral King power line is neither a hydro-electric project nor a primary transmission line. Therefore, this Court should affirm the decision of the court of appeals which found it "unlikely that the appellee could prevail as to such a contention" (A. 231).

In addition to arguing that no power line may be built across Sequoia National Park without specific Congressional approval, the Sierra Club argues that ever such electrical line must serve a park purpose.

Congress did not restrict the Secretary to granting term permits only for lines serving park purposes. The Act of 1911, 16 U.S.C. § 5, expressly authorizes term rights-of-way "within or *through* any national park" so that such lines may serve areas *outside* parks. The legislative history of

84. Congressional authorization of a power project pursuant to Section 45c has been required only once. In 1963, in connection with Federal Power Commission re-licensing of its Kaweah No. 3 Project, the Southern California Edison Company obtained legislation specifically authorizing the Secretary of the Interior to issue a permit for the continued operation, maintenance and use of hydro-electric facilities within Sequoia National Park. 77 Stat. 70 (1963). That project includes water storage reservoirs at Mineral King and a flume crossing Sequoia National Park.

that section confirms that Congress intended to broaden the authority of the Secretary of the Interior and the Secretary of Agriculture to permit power lines to be built on public lands by giving the permittees more certain tenure.[85]

The Sierra Club contends that the National Park Service Act of 1916, 39 Stat. 535, 16 U.S.C. § 1, amended the Secretary's authority to grant term rights-of-way by requiring that every such right-of-way serve a park purpose. That act allows the Secretary to "promote and regulate the use" of national parks by "such means and measures as conform to the fundamental purpose of said parks." 16 U.S.C. § 1. These purposes are recreation and preservation. There is no indication that the proposed power line will not *conform* to park purposes. Contrary to the Sierra Club's contention, Section 1 does not require that every line *serve* a park purpose.

The Sierra Club also argues that the 1916 act limits the Secretary's authority to grant revocable rights-of-way for power lines in Sequoia National Park under 16 U.S.C. § 79. However, 16 U.S.C. § 4 expressly states that Section 1 *does not* "affect or modify" Section 79.

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85. "The committee finds that under the existing law and regulations the only right of way that can be obtained for electrical lines for the transmission of power across the public domain and national forests is a temporary revocable permit issued by the Secretaries of the Interior and Agriculture. That under the present conditions, in many cases, it is impossible for companies interested in the development of power outside of the limits of national forests to successfully raise the necessary money for the construction work where the tenure of the right of way across public lands and national forests is subject at any time to be revoked by an administrative officer of the Government. The committee is unanimously of the opinion that the legislation called for in the bill should receive immediate and favorable consideration." SEN. REP. No. 967, 61st Cong., 3d Sess. 1 (1911).

2. The Secretary Of The Interior Has Authority To Permit The State Of California To Improve The Mineral King Access Road.

The Sierra Club erroneously contends that the Secretary of the Interior has threatened to exceed his statutory authority by permitting the State of California to construct a road across Sequoia National Park to serve the public travelling to recreation lands in Sequoia National Forest.

The Secretary of the Interior has express authority over national park roads under the Act of April 9, 1924, 43 Stat. 90, 16 U.S.C. § 8:

> The Secretary of the Interior, in his administration of the National Park Service, is authorized to construct, reconstruct, and improve roads and trails, inclusive of necessary bridges, in the national parks and monuments under the jurisdiction of the Department of the Interior.

In addition to this express power, the authority of the Secretary of the Interior to grant road permits is inherent in the delegation by Congress to the Secretary of the power to "regulate the use of the federal areas known as national parks." 16 U.S.C. § 1. For decades the Secretary of the Interior has exercised this land management power by permitting construction of roads traversing national parks.[86]

These two sections give the Secretary broad power over road building in national parks. Nevertheless, the Sierra Club argues that to permit the State of California to im-

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86. Examples of such roadbuilding include the Blue Ridge Parkway connecting Shenandoah National Park and the Great Smoky Mountain National Park, the Zion-Mount Carmel road and tunnel, the Wawona tunnel and road in Yosemite, the Cape Royal road in the Grand Canyon, the Paradise Valley and Yakima Park highway in Mount Rainier, the Sylvan Pass road in Yellowstone, and the Going-to-the-Sun road in Glacier. See generally, Ise, Our National Park Policy 326-28 (1961).

prove the existing county road crossing the west side of Sequoia National Park would be illegal because under Section 8 the Secretary *alone* is authorized to construct such roads. Such a restrictive interpretation is unwarranted.

This case does not involve delegation by the Secretary of the Interior of any quasi-legislative or judicial function.[87] Road building in national parks is within the authority of the Secretary of the Interior, and the means by which this is accomplished is also for him to determine. It is within the Secretary's power to authorize the state to build a road which he himself could have constructed.

Section 8, designed to broaden the Secretary's power to build and improve roads in national parks, should not be construed to prohibit federal cooperation with state or local authorities.[88] The weakness of the Sierra Club's argument is especially apparent in this case. Since 1885, Tulare County has owned and maintained the Mineral King road.[89] The

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87. While an administrative body cannot delegate these types of functions, it can delegate the performance of administrative and ministerial duties. See Krug v. Lincoln Nat'l Life Ins. Co., 245 F.2d 848 (5th Cir. 1957).

88. The Secretary himself has tried to promote federal-state cooperation to further recreational interests. He has adopted a regulation in connection with his management of public lands generally. The objective of the regulation is "To assure that persons wishing to use lands have access to them and that outdoor recreation use does not damage the resources," 43 C.F.R. § 6250.0-2. The Department's policy is stated in Section 6250.0-6: "In cooperation with State and local governments and private individuals and associations, the Bureau will endeavor to provide access for public use and enjoyment of lands with outdoor recreation values."

89. The Mineral King Road was conveyed to Tulare County October 7, 1885. The deed in Volume 12 of Deeds in the office of the Tulare County Recorder reads as follows:

> Know all men by these presents, that I, Robert McKee of the County of Tulare, State of California, for and in consideration of $1,573.30, the receipt whereof is hereby acknowl-

portion which is within Sequoia National Park is maintained by the county with the approval of the Department of the Interior. The road has been improved and its alignment changed from time to time since Sequoia National Park was created in 1890. The Sierra Club argues that the Secretary has incorrectly interpreted his authority and has unlawfully permitted county maintenance of the Mineral King road for the last eighty-one years. This is an unreasonable interpretation of Section 8.

The Sierra Club further argues that every park road must serve a park purpose. This too is untenable. The only statutory limitation on the broad Congressional delegation of managerial power over road building to the Secretary of the Interior is the general admonition of 16 U.S.C. § 1 which requires that the Park Service:

> [P]romote and regulate the use of [National Parks] . . . by such means and measures as conform to the fundamental purpose of said parks . . . which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.

The Secretary of the Interior in authorizing the Mineral King road has exercised the power to *regulate* the use of a federal area — the national park land on which the road will be constructed. Under 16 U.S.C. § 1 the road must

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edged, do grant to the County of Tulare in the State of California, bounded and described as follows: All that certain Toll Road known as the Mineral King Wagon and Toll Road, together with the Franchise and all and singular the appurtenances thereto belonging or in anywise appertaining.

It has never been conveyed to the United States.

conform to the fundamental purpose of the park. It does not, however, require that every measure *serve* a park purpose. The only limitation on the Secretary's broad authority over roads in national parks is that roads cannot be built either without regard to conserving national and historic objects and wildlife within the park, or in a way which would impair the enjoyment of the park for future generations. The Secretary acted within the scope of his authority when he approved the construction of the road. The Ninth Circuit's unanimous decision on this issue, "We cannot find in the appellee's contentions concerning this proposed road any degree of substantiality" (A. 231), should be affirmed.

3. The Secretary Of The Interior Did Not Abuse His Discretion In Approving The Mineral King Road.

A determination that the Secretary has acted within the scope of his statutory delegated authority does not end this Court's review of his decision. The Sierra Club has alleged that the Secretary of the Interior's decision to approve road construction across Sequoia National Park was also an abuse of discretion.

Under *Overton Park* the Secretary's decision must stand unless he has failed to consider all relevant factors or has made a clear error of judgment. The Sierra Club has not shown a substantial likelihood that the Secretary of the Interior did either.

The Secretary of the Interior's Approval of the Mineral King Road Was Based Upon a Consideration of All Relevant Factors.

An agency's decision must be based upon a consideration of all relevant factors. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). These factors are contained in

the statutes which give administrative agencies their authority to act:

> Statutes bestowing discretion on a federal official are not passed in vacuum. They may contemplate a broad range of permissible decisions, but the outer boundaries of the decision-making process are circumscribed by the statutory framework administered by the agency. . . . Decisions may not be based upon factors irrelevant to the purposes of the statutory scheme, nor may factors relevant to the express congressional purpose be totally ignored. *Sierra Club v. Hardin,* 325 F. Supp. 99, 112-13 (D. Alaska 1971)

Thus, in *Scenic Hudson Preservation Conference v. F.P.C.,* 354 F.2d 608 (2d Cir. 1965), the relevant statute, the Federal Power Act, required the commission to adopt the project "best adapted to a comprehensive plan for improving or developing a waterway."[90] In *Overton Park* the Secretary of Transportation under the Transportation Act could not build a highway through a park unless there was "no feasible or prudent alternative."[91]

The relevant statute in the case at bar is 16 U.S.C. § 1, requiring the Secretary of the Interior in regulating the use of federal areas to employ only those means and measures which conform to the purpose of such parks. If the Secretary had ignored this directive when he approved the Mineral King road, he would have abused his statutory discretion, but as the Ninth Circuit noted, "The record shows a great deal of concern in its planning for preservation of aesthetic and ecological values" (A. 230).

The Secretary of the Interior considered the Mineral King road in detail when he surveyed Sequoia National

90. 354 F.2d at 614 (2d Cir. 1965).

91. 401 U.S. 402, 405 (1971).

Park roadless areas pursuant to the Wilderness Act of 1964, Act of Sept. 3, 1964, 78 Stat. 890, 16 U.S.C. §§ 1131-36. At public hearings in 1966 on the Park Service wilderness proposal for the park, the Mineral King road was hotly debated for two days. The Sierra Club urged wilderness boundaries which would have blocked any improvement of Mineral King access.[92] The club, however, has failed to mention the close relationship of the Secretary's decision to permit improvement of the Mineral King road and his recommendation that nearly three quarters of a million acres of Sequoia and Kings Canyon National Parks be set aside as wilderness.[93]

The Secretary of the Interior considered at least three alternate routes (A. 61, 140) before consenting to the state-approved route. One of the alternates would have involved massive tunneling across Sequoia National Park. Though it involved construction of a tunnel, there was no evidence that its ecological impact on the park would have been any less than that of the route chosen. The second would have traversed the surface of the park, but the Forest Service found it was inferior to the proposed route in all respects.[94] The final alternative involved a long tunnel passing through national forest rather than national park land. It was routed through such a remote and inaccessible region of the Sierra that its estimated cost of construction was $78 million (A.

92. H.R. Doc. No. 92-102, 92d Cong., 1st Sess. 30 (1971).

93. *Id.* at iii.

94. "In our judgment, the Clarkeson proposed location and design would result in a more costly highway, a less esthetic highway, a more positive barrier to wildlife movement, and would violate many of the concepts we have attempted to use in making this highway an integral part of the terrain it traverses." *Proposed Road to Mineral King,* Memorandum to the Chief, U.S. Forest Service from the Director of Engineering, Oct. 18, 1968.

66)—three times the cost of the proposed Mineral King road. The Secretary of the Interior and his department considered these alternatives carefully, and concluded, "We have reviewed all material available to us on the proposed location of the Mineral King Road. On the basis of this review we now agree that the division of highways route should be selected" (A. 138).

Finally, at least four different comprehensive studies (A. 57, 83, 140), which considered the impact of the road improvement on the park and the forest, fish and wildlife, the giant Sequoias and streams, possible alternative routes and the opposition to the road, were available to the Secretary before he acted.[95]

At the time the Secretary made his decision about the proposed road he had all the relevant factors before him and considered them carefully. Only when he was sure that park values could be properly protected, that no alternative route was feasible, and that future expansion of the road was not contemplated, did he approve (A. 136-39).

There Is No Clear Error Of Judgment.

Under *Overton Park* the decision of an administrator who has considered all relevant values and followed the appropriate statutory procedures must stand unless it is arbitrary or clearly erroneous. Such a decision is given a strong presumption of regularity and a court will not substitute its judgment for that of the administrator.

The approval of the Mineral King Road by the Secretary of the Interior was neither arbitrary nor erroneous. The 1916 National Park Service Act sets forth two park purposes. One is the preservation of the scenery, wildlife, and

95. See note 5 *supra*.

natural and historic objects in the park. The other is to provide for recreation, for "the enjoyment of the parks" in a way which will leave them unimpaired for their enjoyment by future generations. This does not forbid park improvements which may alter park areas. For example, 16 U.S.C. § 8 specifically authorizes road construction and, "obviously any road construction to present day standards cannot be built through this area without affecting the ecology of the area" (A. 142).

Often the two purposes of recreation and preservation conflict. The Mineral King road is an example of how judicious management of public lands can reconcile these two values—to preserve park areas while providing additional public recreational opportunities. The Sierra Club's single-purpose management philosophy, rejected by the Park Service and Forest Service, would inhibit the cooperative management of the Sequoia National Park-Sequoia National Forest region and effectively seal off the Mineral King area from public recreational use. Mineral King is bounded on the west, north and east by Sequoia National Park. If Mineral King were a part of the park itself, the Secretary of the Interior would have the authority under Section 8 to construct this road. It would be unreasonable to block access to this region because it is in a national forest rather than a national park. In fact, there is a Congressional policy favoring road building to service national forests. 16 U.S.C. Section 532 states:

> Congress hereby finds and declares that the construction and maintenance of an *adequate system of roads and trails within and near the national forest* and other lands administered by the Forest Service is *essential* if increasing demands for timber, *recreation* and other uses of such land are to be met. (Emphasis added.)

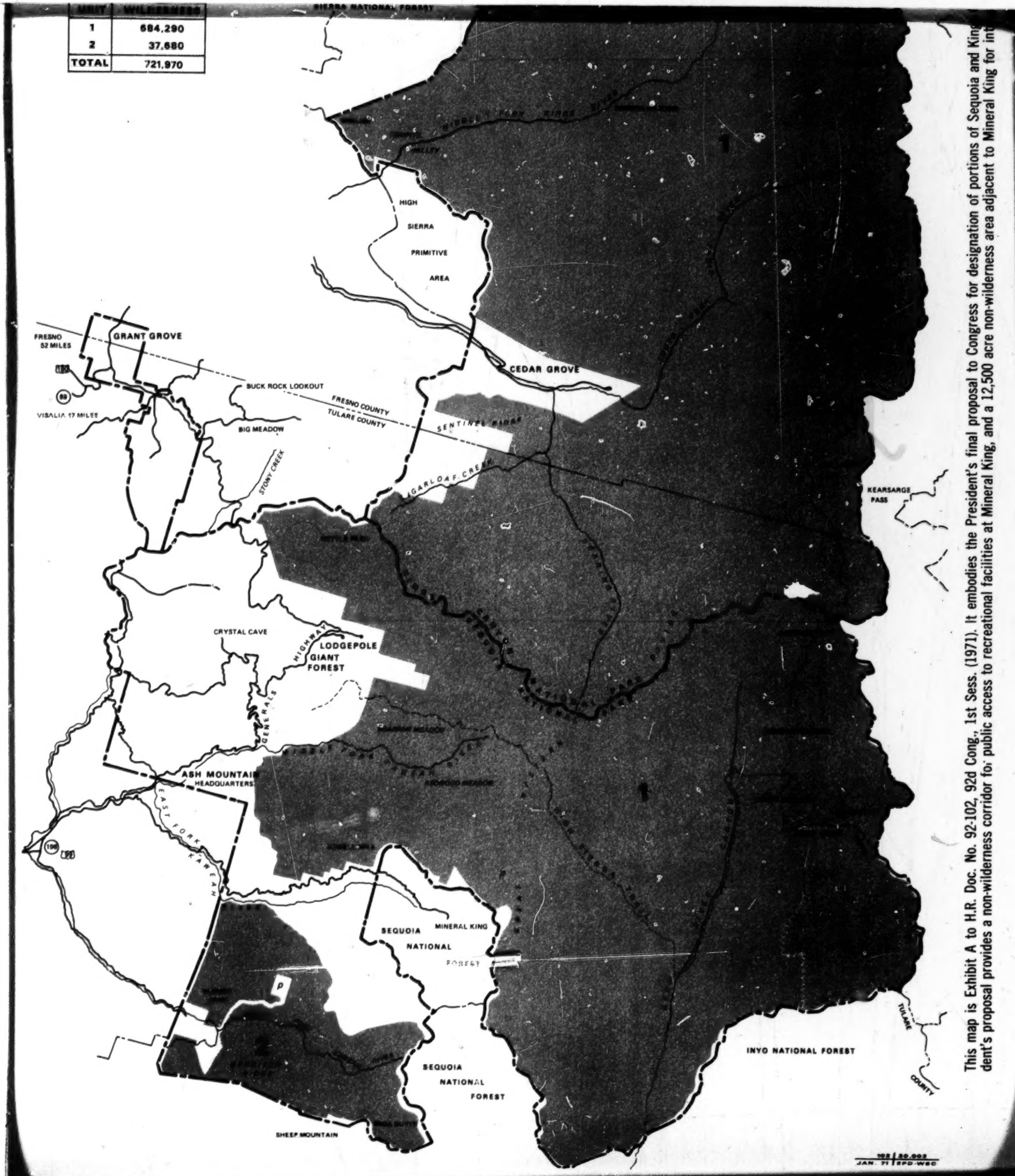
The Secretary of the Interior has urged cooperation between land management agencies to achieve both wilderness and recreation goals:

> Parks do not exist in a vacuum. It is important in planning for a park that the teams take into account the total environment in which the park exists. Of particular significance are the plans for and the availability of other park and recreation facilities within the region at the Federal, State, and local levels, as well as those of the private sector for the accommodation of visitors, access to the national parks, the roads within them, wildlife habitat, etc. Accordingly, the master plan team first analyzes the entire region in which the park is located and the many factors that influence its management.
>
> Moreover, where national parks and national forests adjoin, such as Mount Rainier, Yellowstone and Grand Teton National Parks, the National Park Service and the U.S. Forest Service formalized, in 1963, a joint effort to analyze the resources and visitor needs, and develop cooperative plans for the accommodation of these requirements which will best insure the achievement of both of our missions. This program formalizes and broadens the informal efforts made for many years by many park superintendents and forest supervisors to coordinate management programs, including visitor facilities and services. Such cooperative programs are authorized by Section 2 of the Act of August 25, 1916, establishing the National Park Service.[96]

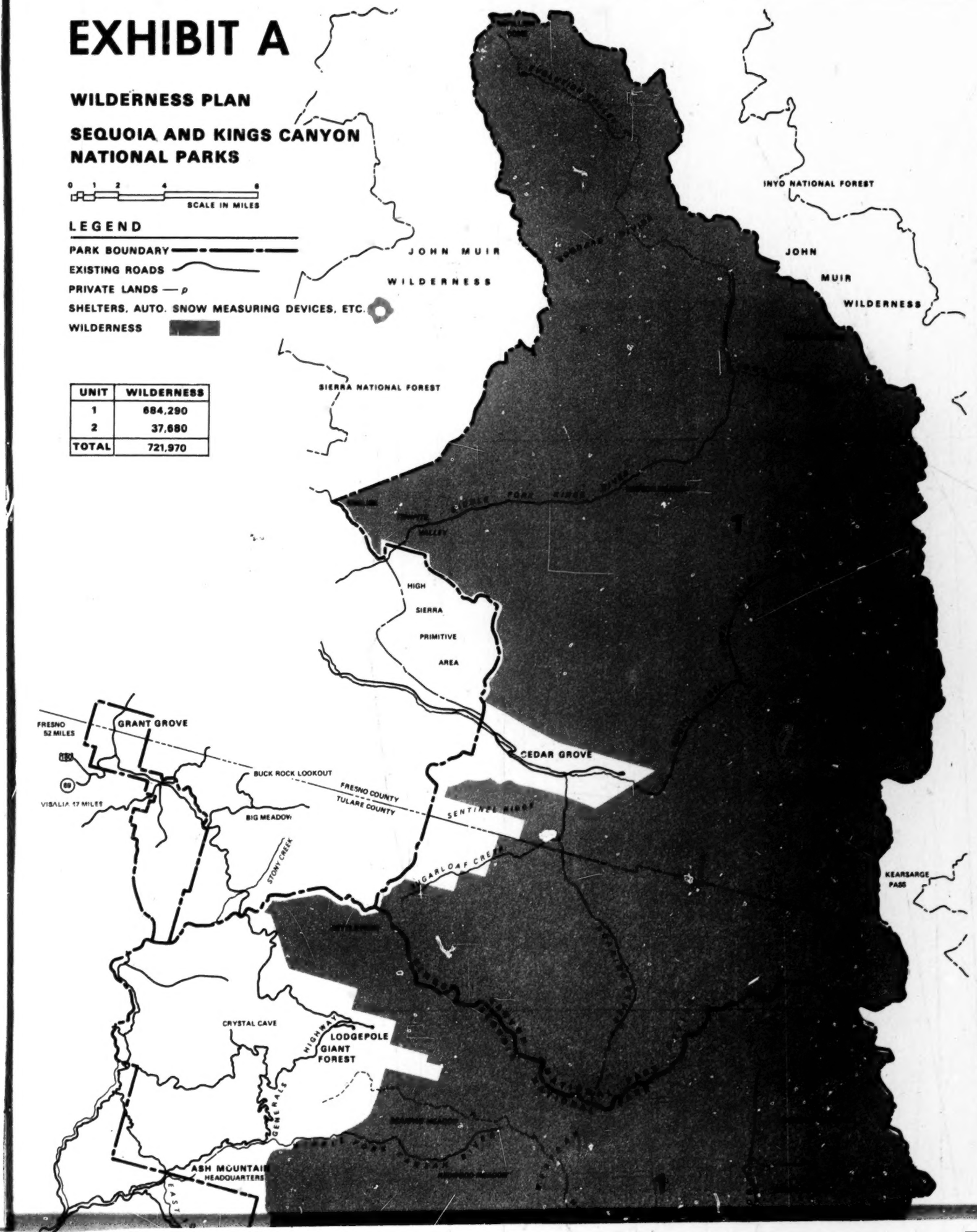
On the basis of such cooperative planning, the Secretary has now made his recommendations to the President for Congressional inclusion of vast areas of Sequoia and Kings Canyon National Parks in wilderness. The Secretary's report to the President notes the need for public recreation areas in the Sequoia-Kings Canyon Region:

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96. H.R. Doc. No. 92-102, 92d Cong., 1st Sess. 4 (1971).



This map is Exhibit A to H.R. Doc. No. 92-102, 92d Cong., 1st Sess. (1971). It embodies the President's final proposal to Congress for designation of portions of Sequoia and King dent's proposal provides a non-wilderness corridor for public access to recreational facilities at Mineral King, and a 12,500 acre non-wilderness area adjacent to Mineral King for int



2102, 92d Cong., 1st Sess. (1971). It embodies the President's final proposal to Congress for designation of portions of Sequoia and Kings Canyon National Parks as wilderness. The Presidential corridor for public access to recreational facilities at Mineral King, and a 12,500 acre non-wilderness area adjacent to Mineral King for intensive public enjoyment of Sequoia National Park.

> The greatest use impact on these public park and forest lands comes from the southern California region, particularly the Los Angeles/Long Beach metropolitan area, which alone contained about 35% of California's 19,950,000 population in 1970.[97]

To meet the need for public recreation the Secretary has recommended exclusion of the Mineral King road corridor and 12,500 acres adjoining Mineral King from the proposed wilderness area. The report notes that the Mineral King facilities, though on Forest Service land, will enable more people to enjoy Sequoia National Park:

> The proposed Mineral King development on national forest lands would provide lifts and trams, as well as improved trail access to the hydrographic divide around the Mineral King Valley which marks the boundary of Sequoia National Park. The lifts and tram transportation system will place thousands of skiers and hikers on park lands where there are superb opportunities for ski touring in winter and hiking in summer.[98]

The Secretary of the Interior's decision to approve the Mineral King road did not deviate from Section 1 requiring him to consider both recreation and preservation in administering the national parks. In recommending commitment of vast areas of Sequoia and Kings Canyon National Parks to wilderness he has promoted preservation. In approving the Mineral King road he has promoted recreation. This does not make his decision arbitrary; it merely makes it inconsistent with the Sierra Club's particular bias. The court in *Sierra Club v. Hardin*, 325 F. Supp. 99, 113 (D.

97. *Id.* at 10.

98. *Id.* at 13.

Alaska 1971), summarized the type of review to be given under the *Overton Park* standard:

> The scope of review is limited, however, to the question of whether or not the Secretary has complied with the mandatory procedures required by the relevant statutes. Where the final decision was dependent on the relative weight to be given the prescribed decisional inputs and no standard was suggested by the statute, the court treated the decision as 'committed to agency discretion' within the meaning of Section 701 of the Administrative Procedure Act and refused to substitute its judgment for that of the administrator absent a clear showing that his discretion had been abused.

Congress has directed the Secretaries of the Interior and Agriculture to increase public use of parks and to enhance recreational opportunities on public lands.[99] The Mineral King road fulfills that Congressional purpose. Since the Secretary of the Interior's decision reflected consideration of the relevant statutory values and was not clearly arbitrary, there was no strong likelihood that he abused his discretion.

4. The Secretary Of The Interior Was Not Required To Hold Hearings On The Road.

There is no merit to the Sierra Club's final contention that the Secretary of the Interior was required to hold public hearings regarding the location and design of the Mineral King access road. No statute or departmental regulation requires such hearings.

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99. See, e.g., the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528, which lists outdoor recreation as a use of the national forests. See also the Outdoor Recreation Programs Act, 16 U.S.C. §§ 460l-13, 77 Stat. 49 (1964); Outdoor Recreation Resources Review Act, 72 Stat. 238 (1958).

Public administrative hearings in connection with land management decisions are required neither by the land management statutes nor by the Administrative Procedure Act.[100] The Sierra Club itself has acknowledged this (A. 41).

However, the Sierra Club contends that the Department of the Interior was required by its published procedures to hold a public hearing on the location and design of the access road. The authority relied upon is a last minute policy statement of Secretary Udall, "Road Building in National Parks," adopted without hearings only two days before he left office in January, 1969.[101] It was immediately and validly revoked by Secretary Hickel.[102]

The Sierra Club argues that this revocation was ineffective because the Secretary did not comply with Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553. That act did not apply to the Udall policy statement. Section 553(a)(2) exempts matters "relating to agency management of personnel or to *public property,* loans, grants, benefits, or contracts," (emphasis added) from rulemaking procedures. The Department of the Interior has often invoked this "public property" exception and courts have approved the exemption.[103]

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100. In 1960 when Congress reexamined the basic land management policies of the Forest Service and enacted the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528, *et seq.*, it chose not to impose a public hearing requirement in connection with planned recreational uses of national forests. In those few instances in which Congress has desired administrative hearings in connection with public land management decisions, it has specifically so provided in the relevant statute. *E.g.*, Classification and Multiple Use Act, 43 U.S.C. § 1411(a); Wilderness Act, 16 U.S.C. § 1132(d)(B).

101. 34 Fed. Reg. 1405-06 (1969).

102. 34 Fed. Reg. 6985 (1969).

103. For example, the Department held that special rules issued in connection with the Taylor Grazing Act, 43 U.S.C. §§ 315-315r,

The revocation of the Udall policy statement concerned national parks; these are clearly public property. Therefore, the exception applies and Secretary Hickel's revocation was valid.

Even if the "public property" exception were not applicable, Secretary Udall did not comply with 5 U.S.C. § 553 in adoption of the statement on "Road Building in National Parks." He did not give notice of the proposed rulemaking, nor include a statement of the time, place or nature of public rulemaking proceedings, nor did he give interested persons any opportunity to participate in the proposed rulemaking. He signed the rule on the eve of his departure from office and it appeared in the Federal Register thereafter. Under the Sierra Club's own reasoning this policy statement was never validly adopted.

The Sierra Club cannot properly argue two conflicting factual hypotheses. It would have this Court apply Section 553 to the revocation, but not the adoption of Secretary Udall's policy statement. If Section 553 applies to Department of the Interior rulemaking, it applies both to adoption and to revocation; otherwise it applies to neither. In either case no hearing was required.

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relating to grazing privileges on public lands, fell within this exception. When this determination was challenged, the court in McNeil v. Seaton, 281 F.2d 931, 936 (D.C. Cir. 1960), held:

> [T]he notice requirements of section 4 of the Administrative Procedure Act contain an express exception when there is involved rule making relating 'to public property, loans, grants, benefits, or contracts.' That we are here dealing with matter relating to public property is obvious. Although the Taylor Act in certain other respects provides for public notice and hearing, there is no such requirement as to regulations or rulemaking concerning the issuance of grazing permits or a special rule touching problems with respect thereto.

This "public property" exception was again approved by the court in a contest over leasing rights on a moose refuge, Duesing v. Udall, 350 F.2d 748, 752 n.4 (D.C. Cir. 1965).

The Ninth Circuit correctly dismissed the Sierra Club's claim that a hearing was required as unmeritorious, stating: "The matter of public hearings cannot be considered a substantial factor in this proceeding" (A. 233).

III. THERE WAS NO IMMINENT THREAT OF IRREPARABLE HARM TO THE SIERRA CLUB

The evidence available to the trial court on the motion for a preliminary injunction supports the court of appeals' finding that an injunction was not needed to prevent imminent and irreparable harm to the Sierra Club. The trial court decided not to require the Sierra Club to defer its request for injunctive relief until the Division of Highways had completed preliminary planning for the access road, in order to relieve it of the burden of " 'watchful waiting' upon the State of California" (A. 198).

Apparently the trial court was impressed by the Sierra Club's vivid rhetoric. Its arguments have been replete with images of crews with bulldozers and chain saws poised on the edge of Sequoia National Park, ready to lay it waste if not immediately restrained by judicial intervention. The undramatic fact is that, even had the injunction not been issued, no physical alteration of the landscape would have occurred until July, 1970, over a year from the filing of the complaint and nearly a year after the temporary injunction was issued on August 4, 1969.

The affidavits of Richard Deffebach, the supervising District Engineer in the California Department of Public Works (A. 160), W. S. Davis, Assistant Regional Forester in the United States Forest Service (A. 164), and John V. McLaughlin, Superintendent of Sequoia National Park (A. 180), all of whom have been intimately involved with the planning of the Mineral King recreational development,

confirm that if the Department of the Interior had issued a permit to the State of California covering the proposed access road, at least five months would have elapsed before the preliminary plans could have been submitted to the National Park Service for its approval. Thereafter, approval of both the Bureau of Land Management and United States Forest Service was required. Finally, since the winter snows at that time would have made examination of the proposed right-of-way impossible, the State of California could not have called for construction bids until May, 1970, delaying actual construction of any portion of the highway until July, 1970 (A. 162, 163).

The trial court, though recognizing there was no actual imminent threat of change in the natural environment, issued its injunction under the mistaken impression that once the Department of the Interior granted a permit to the California Division of Highways the court would be powerless to protect the land within the Sequoia National Park (A. 198). In fact, the court would have retained jurisdiction of each of the named defendants whose ultimate approval of the detailed road design was required before the State could solicit construction bids on the road. Since the permit was to be revocable the court could have ordered its revocation by the Secretary of the Interior at any time. For reasons of its own the Sierra Club chose not to join the State of California and Disney as defendants. If it had done so, they also would have been subject to the court's equitable jurisdiction. The decision not to name additional defendants was undoubtedly based on the Sierra Club's desire to avoid posting a bond under Rule 65c of the Federal Rules of Civil Procedure by persuading the court that the injunction would not harm the named defendants (A. 202).

It was inappropriate for the court to base its grant of extraordinary injunctive relief on the Sierra Club's tactical decision not to join the persons most affected by the injunction as defendants.

There was no showing of imminent physical harm to park land. The burden on the Sierra Club of monitoring the progress of planning the access road by the State of California so it could request injunctive relief if an appropriate time ever arose would have been inconsequential. Since a showing of imminent and irreparable harm is a necessary condition to the issuance of any injunction,[104] the district court should have denied the Sierra Club's motion for a preliminary injunction.

The trial court's extreme solicitude for the Sierra Club's convenience has imposed substantial costs upon interested non-parties. The nominal defendants, government employees, have no financial stake in the outcome, but the injunction has already cost the United States two years of permit fees it will collect from the operation of the recreation facility at Mineral King—a minimum of $75,000 per year (A. 169). The State of California has suffered an annual increase in construction costs from 3% to 5%, a sum already approximating more than $1.5 million (A. 163). The cost of construction of the facilities planned by Disney has escalated in the same way. Skiers and other potential users of the completed recreational area are disappointed by the delays involved and may eventually pay more for lift tickets to finance the recreational facilities.

The most severe impact has fallen upon the residents of Tulare County who are being denied the use of Mineral King and deprived of an estimated $1.5 million in annual tax

104. Yakus v. United States, 321 U.S. 414 (1944).

revenues which the completed development will bring to the County.

The Sierra Club's contention that the trial court "tailored" the injunction to enjoin only "physical disturbance of the terrain" (B. 37) is deliberately naive. The affidavit of Mr. Deffebach, the California Department of Public Works Engineer, made it clear that the issuance by the Interior Department of its special use permit covering the access road (which was specifically enjoined) is a prerequisite to the planning, land acquisition, and contract preparation activities which must precede the solicitation of bids, awards of contracts, and actual construction. As a matter of prudent financial management, the State of California has not and will not accomplish any significant planning for the access road while the Interior Department is subject to an outstanding injunction barring issuance of the road permit. For all practical purposes, development of the recreational potential of Mineral King has been at a standstill since August, 1969.

The district court's issuance of the preliminary injunction to the Sierra Club was an abuse of discretion. The Sierra Club failed to show any irreparable harm; the preliminary injunction was properly vacated by the Ninth Circuit on that ground alone.[105]

CONCLUSION

The United States Court of Appeals for the Ninth Circuit reversed the district court order granting a preliminary injunction, holding that the Sierra Club lacked standing to maintain the action and further unanimously holding that

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105. See 7 MOORE'S FEDERAL PRACTICE § 65.04 (1); Udall v. D.C. Transit System, Inc., 404 F.2d 1358, 1361 (D.C. Cir. 1968); Foundry Services v. Beneflux, 206 F.2d 214, 216 (2d Cir. 1953).

there was little or no likelihood the Sierra Club would prevail on the merits. The Sierra Club asserts it has standing as a private attorney general, but for this Court to uphold this contention it must virtually abolish the requirement of standing to maintain actions against federal officials in the federal courts. To so hold would alter fundamentally the relationship of the judiciary and the executive branches, thrusting onto the judiciary a heavy burden of day-to-day management of the public lands, a burden it is not equipped to assume.

In deciding whether to issue a preliminary injunction the district judge was obliged to assess the likelihood that the Sierra Club would succeed on the merits. The scope of review of the administrator's action is limited. There is no strong likelihood that either the Secretary of Agriculture or the Secretary of the Interior, or their subordinate officials, acted outside the scope of their authority, abused their discretion or made any procedural error in deciding how best to manage the federal lands at Mineral King. Therefore, the unanimous holding of the Ninth Circuit that there was little or no likelihood of the Sierra Club's success on the merits and that the issuance of a preliminary injunction was an abuse of discretion was correct.

For the foregoing reasons your amicus respectfully requests that the judgment of the Ninth Circuit be affirmed.

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Attorneys for the County of Tulare

August, 1971

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Supreme Court, U.S.
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No. 70-34

In the Supreme Court of the United States

OCTOBER TERM, 1971

SIERRA CLUB, INC., PETITIONER

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

ERWIN N. GRISWOLD,
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-34

SIERRA CLUB, INC., PETITIONER

v.

ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (App. 208–235) is reported at 433 F. 2d 24. The memorandum of the district court (App. 186–199) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1970. The petition for a writ of certiorari was filed on November 5, 1970, and was granted on February 22, 1971. 401 U.S. 907. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Sierra Club, a national conservation organization, has standing to challenge a decision by the Secretaries of Agriculture and Interior to develop public lands in the Mineral King Valley in California for public recreation, and the concurrent decisions to accomplish that development through private contractors and permittees.

2. If so, whether there was sufficient substance to a claim that the Secretaries of Agriculture and Interior lacked statutory authority to authorize the recreation project and related facilities to justify a preliminary injunction.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The relevant constitutional and statutory provisions and regulations are set forth in the appendix to petitioner's brief.

STATEMENT

Sequoia National Forest (including the Sequoia National Game Refuge, which is coextensive with the Forest as to all forest lands in issue in this case) and the adjacent Sequoia National Park are public domain lands of the United States. Congress has placed the administration of the Forest and Game Refuge in the Department of Agriculture and the administration of the Park in the Department of the Interior, to be exercised, respectively, under the direction of the Secretaries of Agriculture and Interior, subject to the provisions of 16 U.S.C. 1, 2, 5, 8, 497, 528, 531, 551 and 688. Additional restrictions are placed on the

Secretary of the Interior with respect to the Park by the provisions of 16 U.S.C. 43 and 45c.

The Mineral King Valley is the top part of a finger of national forest and game refuge land jutting into the southern portion of the Park. Indeed, it is naturally a part of the Park, and was excluded from it principally because of mining claims and other private property existing there at the Park's founding; its designation as a game refuge was intended in large part to assure that its administration would be park-oriented.[1] The Valley is a snow bowl surrounded on three sides by high mountains; it opens to the west, on a strip of Park land approximately six miles wide. Ever since the founding of the Park, access to the Valley has been by means of an unimproved road across this strip; the primitive condition of this road has been a factor substantially limiting the number of persons visiting Mineral King. (See A. 210, 230.)

In view of the Valley's prolific snows and convenient location near all of California's major population centers, the Forest Service has long been interested in developing Mineral King for skiing and other recreational use (see A. 47; see also *Mineral King: A Planned Recreation Development,* Forest Service, United States Department of Agriculture (1969)). Its most recent effort began in February 1965, when it issued a prospectus inviting bids for development of a recreational project there. Six bids were submitted, and the Forest Service chose the one

[1] See *infra*, pp. 51–52.

submitted by Walt Disney Productions, Inc. Disney then received a preliminary three-year permit to conduct studies and surveys of the Valley in order to develop its plans further. This permit provided that Disney would receive a 30-year term special use permit for up to 80 acres of Valley lands, and a revocable special use permit for additional acreage, if Disney's final plans were submitted and approved prior to the expiration of the study permit, and if an improved access road was contracted for and funded. The term of the study has since been extended to expire ninety days following conclusion of the present suit.

Disney's final plans were submitted and approved in January 1969 (A. 28). They propose an expenditure of about $35 million. Major facilities for up to 14,000 daily visitors (such as motels, restaurants, underground parking lots, administrative, service and maintenance facilities, a railroad station, hospital and swimming pools) are to be constructed on about 65 acres under a 30-year term permit. Auxiliary facilities, including trails, ski lifts, and portions of the tertiary sewage treatment facilities, occupying less than 400 acres, would be constructed within a 13,000-acre area of the Forest and Game Refuge under a nonexclusive, revocable, special use permit. Clause 15 of the special use permit provides that it "may be terminated upon breach of any of the [numerous]

conditions herein or at the discretion of the regional forester or the Chief, Forest Service."[2]

In connection with this project to develop public lands, the Department of the Interior was asked to issue a revocable permit to allow the State of California to replace 9.2 miles of the existing, substandard access road which traversed the adjacent Sequoia National Park, and to provide a right of way for an electrical transmission line through the Park. It has been clear from the start that development of the Valley would require substantially improved highway access through the adjacent strip of Sequoia National Park and electrical transmission lines to carry power to the development. To traverse the mountains which wall off the Valley from adjacent National Forest lands would add about an hour's driving time from the northern parts of the state, and would cost an estimated $78 million—more than three and one-half times the estimated $22 million construction costs for a road through the park; a tunnel under the park strip would also cost almost $80 million (A. 66, 62).

The proposed permit[3] (reprinted in Appendix A, *infra,* pp. 67–79) extensively and thoroughly

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[2] The 30-year term permit is not terminable at discretion, but may be terminated for breach of numerous specified conditions, including many designed to protect environmental values.

[3] Although as a result of the present suit the proposed permit was not executed, the parties have agreed on its terms and conditions.

provides for protection of park values. Thus, it requires the transmission line to be buried underground within the road prism (Clause 31). The road itself is to be built substantially with state funds. It will have two lanes with occasional, "carefully located" passing lanes on the uphill grade to permit passing of slow-moving service vehicles in winter, and a maximum design speed of 50 miles per hour (Clauses 16, 19). It will accommodate 700 to 800 autos per hour comfortably, experiencing peak loads of 1200 vehicles per hour (App. 61); if greater access capacity is ever required, the State has agreed that it will not seek "any further improvement of road access" through the Park (Clause 37). Before approving the road, the Department required California to undertake an ecological feasibility study. This was done by Professor Richard J. Hartesveldt (App. 83 *et seq.*). He advised that the road would not damage any of the Park's sequoias, provided that stated precautions were observed. Clause 26 of the permit specifically requires California to comply with the recommendation in the Hartesveldt report; more generally, Clause 16 states that "[d]esign and contruction must afford * * * protection" of environmental features. Clause 34 requires the State to comply with all standards set by the Federal Water Pollution Control Administration and other responsible federal and state agencies. The road fulfills specific park functions by embodying construction of scenic overlooks (Clause 20) and envisages access to interchanges within the Park (Clause 35). Design and construction of the road is, in all re-

spects, subject to departmental supervision and approval (Clauses 1, 6, 9, 10, 12, 16, 20, 21, 22, 23, 25, 26, 28, 29, 35).

Sierra Club, declaring that it had a "special interest in the nature of the uses proposed in the Sierra Nevada Mountains on behalf of the general public," brought the present suit against both Secretaries and their subordinates, seeking to enjoin construction of the recreation project (App. 3–11).

The complaint against Agriculture alleged that the Secretary's issuance of permits for the ski resort violated the Act establishing the National Game Refuge, 16 U.S.C. 688; exceeded the authority for recreational use and occupancy conferred by 16 U.S.C. 497 and 551; and violated the Forest Service's own regulations as to public hearings, 36 C.F.R. 211.20–211.119.

The complaint against Interior alleged that the plan to replace the approximately 9.2-mile segment of the existing route within the Park was illegal under the Acts establishing and regulating the Park, 16 U.S.C. 41, 43, 45c.[4]

The district court ruled that Sierra Club had standing as a plaintiff to seek injunctive relief because of its general interest in conservation matters. On the merits, it held that the Club had raised questions concerning possible excess of statutory authority "sufficiently substantial and serious to justify a prelimin-

[4] In the district court, petitioner also contended that the decision to permit construction of a transmission line across the Park without securing prior congressional approval was illegal. Both lower courts considered this contention on the merits, treating it as a *de facto* amendment of the pleadings.

ary injunction," which it granted against both Secretaries (App. 186–199).

On appeal, the court of appeals reversed on both aspects of the district court's holding (App. 208–235). With respect to standing, the majority found that the Club's asserted interest, as stated in its complaint, was entirely abstract, and hence insufficient to support the litigation. On the merits, the court was unanimous that no sufficient showing that the Club would be likely to prevail in challenging the discretionary actions of these officials of cabinet rank, or that it would suffer irreparable injury, had been made to warrant the district court's granting of preliminary relief. The court noted that the record disclosed that there are now at least 84 recreational developments on national forest lands in which there is such a combination of the term permit and the revocable permit, and found that this was "convincing proof of their legality" (A. 229). It specifically referred to the Forest Service's tabulation showing that many developments make use of combined term and revocable permits for substantial acreage, in some cases in excess of 6,000 acres.

SUMMARY OF ARGUMENT

It is our position that the court of appeals' decision in this case was correct for two reasons. First, petitioner has asserted an insufficient basis to establish its standing to bring this suit. And, on the merits of its claim, petitioner has not made the requisite

showing which would warrant the issuance of a temporary injunction.

I

Though it might have claimed a more traditional basis for standing, petitioner bottomed its claim only on a declared purpose to enforce an undifferentiated "public" interest in assuring that park and forest administrators obey governing statutes. Petitioner's claim to standing is that it has a "special interest," along with other persons for whom it has served regularly as a "responsible representative," in the protection, conservation, and maintenance of the public lands located in national parks, forests, and game refuges. This general concern with conservation matters does not, we submit, give petitioner, in the absence of a legislative conferral, standing to question decisions made by the responsible public officials concerning how these public lands shall be used.

Under the statutes creating national parks, forests, and game refuges, responsibility for the conservation and management of these areas is placed in the Secretaries of Agriculture and Interior, to be exercised on behalf of all American citizens. This responsibility is imposed, not in favor of a more limited group, but rather for the public at large. A claim of interest to assure that these public officers live up to their responsibility—and that is all petitioner has claimed here—is not enough, by itself, to entitle either a single member of the public or an organization like petitioner to seek judicial review of these officers' conduct of their public responsibilities.

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While recent decisions by this Court have significantly relaxed the technical requirements of standing, there still must be a showing of "injury in fact" by the party seeking to invoke federal court jurisdiction. *Association of Data Processing Service Organizations* v. *Camp,* 397 U.S. 150, 153. This requires a claim of individualized harm, which differentiates the complainant from the general public. Petitioner does not claim that it has suffered a distinctive or discriminating harm, which would differentiate it from the public at large for purposes of this litigation.

We are mindful that Congress has in some instances authorized one who lacks a discriminating interest in the subject matter at issue to challenge decisions by public officials with respect thereto. So long as there is a justiciable controversy in such cases, there are no constitutional strictures on Congress' power to permit such suits, even if the sole purpose is to vindicate the public interest. In the absence of a particularized judgment to permit such suits, however, an individual asserting an interest essentially limited to having the law obeyed has no standing to sue. A contrary view would undermine entirely the injury in fact requirement; if harm done to the public as a whole by official misapplication of national law is enough to constitute "injury in fact," then skillful pleading, including an allegation that the complainant is "interested" in the pending issue, is all that is needed to satisfy this requirement. This breaks sharply with the heretofore prevailing principle that a complainant should have some personal stake in the controversy, to assure

"concrete adverseness." *Baker* v. *Carr,* 369 U.S. 186, 204.

There has not been a legislative lowering of the injury in fact barrier to petitioner's suit. Unlike the "persons aggrieved" statutes applicable in other areas, none of the Acts here in dispute provide for judicial review of official action by private persons challenging harm to what they conceive of as the public interest. Nor in our view does the general "persons aggrieved" provision of the Administrative Procedure Act confer this right, since nothing in the history of that Act indicates that Congress intended to permit suits challenging official action on a "public interest" basis. Similarly, the National Environmental Policy Act, which does not deal with questions of standing under other Acts, is inapposite here since no claim under that Act is involved.

II

The court of appeals applied the correct standard to determine whether a preliminary injunction should issue in this case. Where the questions presented are grave and the injury to the moving party is certain and irreparable, while the injury to the opposing party will be slight or can be indemnified, the injunction should be granted. *Ohio Oil Co.* v. *Conway,* 279 U.S. 813, 815. If, on the other hand, the moving party does not show irreparable harm *to him,* then he must establish a "reasonable certainty" that he will prevail on the merits at a final hearing. *Unicon Management Corp.* v. *Koppers Co.,* 366 F. 2d 199, 204–205 (C.A. 2). And where, as here, a preliminary injunc-

tion is sought against public authority and the injury from delay cannot be adequately indemnified, the court may in the public interest withhold preliminary relief, though this may be burdensome on the movant. *Yakus* v. *United States,* 321 U.S. 414, 440–441.

In this case, no "irreparable injury," certainly not of the pertinent kind, has been shown. The proposed project, while it would produce certain irreversible changes, would not alter the basic use of the lands, for outdoors recreation by the public, and would be closely controlled to assure preservation of conservational values. Nor has petitioner shown that any injury that would occur would be an injury *to it*; again, petitioner's only claim is injury to the public at large. Finally, the public interest strongly militates against preliminary relief. The proposed project would affect only a small area of the public lands in this vicinity, and even within that small area environmental values would be carefully safeguarded; on the other side of the balance, delay would almost certainly result in a substantial inflation of costs that might jeopardize the entire project, a risk that cannot be readily, and has not been, indemnified against.

III

Petitioner has not shown, and, we submit, cannot show a "reasonable certainty" that it would prevail at final hearing on the issues which it tendered. Consideration of those issues should take place with an awareness of the geographic and historical realities of the Mineral King Valley and the National Park that practically surrounds it. The Park and Valley are integrally re-

lated by topography and nature. Indeed, the Valley was excluded from the Park for reasons irrelevant to the issues at hand; its designation as a national game refuge was intended to reflect its essential identity with the Park. Development of the Valley, then, may be quite properly viewed as a development of this integral land mass, for a use that is consistent with the larger scheme of all the public lands involved here.

The proposed project envisages development of permanent resort facilities on about 65 acres of Valley lands, to be leased to a concessionaire under a 30-year term permit. Other facilities, such as ski lifts and tows, sanitation facilities and the like, would be located on additional land in the Valley, totaling less than 400 acres, that would be leased under a nonexclusive, revocable permit. The Park is also involved; the State of California would be granted a permit to rebuild and improve an existing road that traverses some 9 miles of Park land to the Valley, and a right of way for a high voltage electric transmission line, to be buried in the road prism, would be authorized. The Secretaries of Agriculture and Interior, who, respectively, are charged with responsibility over the Valley and the Park, have authorized these matters as part of an overall development plan involving Valley and Park, subject, however, to close governmental control to assure full protection of environmental values. Their actions in this regard, we submit, did not exceed their statutory authority.

The Secretary of Agriculture has authority to combine fixed term and revocable use permits for operation of a resort on the national forest lands located

in the Valley. Congress has delegated broad management powers to the Secretary with respect to the national forests. The Secretary may issue term permits of up to 30 years, for up to 80 acres, for "hotels, resorts, and any other structures or facilities necessary or desirable for recreation" (16 U.S.C. 497). The term permit to be issued here clearly is within this authorization. The Secretary has regularly and over many years issued revocable permits as well, under broad regulatory powers with respect to forest lands granted him by 16 U.S.C. 551, allowing uses and covering areas that go beyond the term permit limitations. Congress has explicitly recognized and tacitly ratified the Secretary's extensive revocable permit practice on numerous occasions. And the combining of term and revocable permits to facilitate the development of a desired project has also been a long-standing administrative practice, well known to, but never questioned by, Congress. The amendment of the term permit authorization to increase the acreage limits thereunder did not alter this. It was prompted by wholly unrelated considerations, and was not aimed at impairing in any way the Secretary's revocable permit practice. Indeed, at the time the amendment was enacted, as now, there were outstanding numerous combined term and revocable permits for total areas exceeding the term permit limits, even as increased by the amendment; at present, permittees under such combined permits have constructed more than $70 million of improvements on forest lands. Congress has evinced no intention to change this practice.

Nor is the project inconsistent with the Valley's status as a national game refuge. Public domain lands of this sort can properly be used for public recreation and for facilities to provide for this, where, as in this case, the development is carefully planned and controlled to protect environmental values. The designation of the Valley as a game refuge had but one purpose, to associate it with the Park as regards administration and policies. Thus, any use that would be proper on Park lands would be proper in the Valley. The proposed development fully accords with park uses.

The Secretary of the Interior has authority to permit construction of the replacement road. The new road would give such access only to other public domain (national forest) lands to be devoted to a use, public recreation, wholly proper in national parks. The federal officers responsible for the administration of these contiguous lands must and do cooperate in matters of common concern, and the road clearly serves this purpose. Moreover, in the broader sense required by the history of this region—in which Park and Valley were intended by Congress to be administered and developed as a closely inter-related unit—the new road would serve only a park purpose. The extraordinary safeguards for its construction and the limits on expansion assure that it would not pose any real danger to park values.

Granting the right of way for the electrical transmission line is also within the Secretary's authority. The Secretary has express power to do so. 16 U.S.C.

79 and 5. The proviso to 16 U.S.C. 45c on which petitioner relies, which requires congressional approval of electrical power plants and their associated facilities, including transmission lines, in national parks, has no application here. That provision was aimed only at excluding from park lands large hydroelectric power projects, and does not preclude the limited transmission facilities planned here. Even on more narrow grounds, these facilities would be proper park facilities, since they serve a park purpose in the broader sense appropriate in light of this region's history.

ARGUMENT

I

THE SIERRA CLUB LACKS STANDING TO BRING THIS ACTION CHALLENGING PROPOSED RECREATIONAL USES OF FEDERAL LANDS

It is evident that the past few years have brought a significant relaxation of the technical requirements for standing. As a result, a far wider class of individual and organizational plaintiffs has been found qualified to subject to judicial challenge governmental action which they claim affects their interest. And, as one commentator has noted, "[t]his development has introduced new life into the administrative process and compelled it to respond to forces and values which previously were underrepresented." Jaffe, *Standing Again,* 84 Harv. L. Rev. 633.

To date, however, this Court's decisions have dealt principally with the standing of individuals or groups claiming some interest which sets them apart from the

public as a whole. Here, although it apparently might have claimed a more traditional basis for standing,[5] petitioner based its claim only on a statute declaring an undifferentiated "public" interest, in this case an interest in the preservation of certain types of values in designated public lands. Whether a declared purpose to enforce such an interest is enough, by itself, to establish standing to challenge administrative action allegedly disregarding it is a question this Court has not yet determined. *E.g., Barlow* v. *Collins,* 397 U.S. 159, 172 n. 5 (opinion of Brennan, J.). While Congress has undoubted power to authorize such litigation, *Associated Industries* v. *Ickes,* 134 F.2d 694 (C.A. 2), vacated as moot, 320 U.S. 707, and indeed has before it bills which would grant petitioner the standing it claims, *e.g.,* S. 1032, 92d Cong., 1st Sess., in the absence of such authorization the undifferentiated public interest in assuring that park and forest administrators obey governing statutes is insufficient to establish standing to sue.

A. AN INDIVIDUAL CITIZEN WITH "A SPECIAL INTEREST IN THE CONSERVATION AND SOUND MAINTENANCE OF THE NATIONAL PARKS, GAME REFUGES AND FORESTS OF THE COUNTRY" AND A "PURPOSE TO PROTECT AND CONSERVE THE NATIONAL RESOURCES OF THE SIERRA NEVADA MOUNTAINS" WOULD HAVE NO STANDING TO SEEK JUDICIAL REVIEW OF THE ADMINISTRATIVE ACTS ALLEGED IN THIS CASE

The Sierra Club's essential claim to standing in this case is that it has a "special interest in the conservation and sound maintenance of the national parks,

[5] See the Brief *Amicus Curiae* for The Wilderness Society *et al.*, pp. 54–57; 62–63; *infra*, pp. 32–33.

game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested" and that "one of [its] principal purposes * * * is to protect and conserve the national resources of the Sierra Nevada Mountains" (A. 4). Under the statutes creating national parks, forests, and game refuges, generally, and the Sequoia National Park, Forest, and Game Refuge, in particular, such protection, conservation and maintenance is made a public responsibility of the Secretaries of Agriculture and Interior, on behalf of all American citizens. No claim is, or could be, made that these responsibilities are imposed in favor of a more limited group. A claim of interest to assure that these public officers meet their responsibilities is not enough, in itself, to entitle a single member of the public to seek review of their activities when he believes that they have not done so. More is required "than a common concern for obedience to law." *L. Singer & Sons* v. *Union Pac. R. Co.*, 311 U.S. 295, 304.

The irreducible minimum requirement of standing reflects the constitutional limitation of judicial power to "Cases" and "Controveries"—"whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy.' * * * and whether the dispute touches upon 'the legal relations of parties having adverse legal interests.' " *Flast* v. *Cohen*, 392 U.S. 83, 101. In *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 [hereafter *ADAPSO*], and *Barlow* v. *Collins*, 397 U.S. 159, these two elements were restated as a requirement that there be an allegation of "injury in fact"

which the litigation could redress, and a showing that the interest sought to be protected by the plaintiff is "arguably within the zone of interests to be protected * * * by the statute * * * in question." *ADAPSO,* 397 U.S. at 153.

In most prior cases in this Court, the question of "injury in fact" has been quite simple. In *Hardin* v. *Kentucky Utility Co.,* 390 U.S. 1, *ADAPSO,* and *Investment Company Institute* v. *Camp,* 401 U.S. 617, for example, the claimants alleged that they were suffering competitive harm—an economic effect which sharply differentiated them from other members of the public at large. In *Barlow* v. *Collins, supra,* tenant farmers asserted that actions of the Secretary of Agriculture had permitted landlords to work economic coercion on them—again, a complaint of specific harm limited to a particular group. There was no dispute in any of these cases whether harm had been suffered; rather, the issue was whether that harm permitted the claimants to seek judicial relief. As Mr. Justice Brennan observed in his separate opinion in *ADAPSO* and *Barlow,*

> The more "distinctive or discriminating" the harm alleged and the more clearly it is linked to the defendant's action, the more easily a plaintiff may meet the consitutional test [of injury in fact]. * * * The plaintiffs in the present cases alleged distinctive and discriminating harm, obviously linked to the agency action. [397 U.S. at 172 n. 5.]

Here, however, petitioner cannot claim that it suffered a distinctive or discriminating harm. Its threshold

of pain, as it were, or perception of the harm alleged may be different from that of other citizens. But the Secretaries' duties in administering national lands run to the nation as a whole, not some particular group of citizens, and save for claims of individual interest or use, which have not been made in this case, the harm done by breach of those duties is done to the nation as a whole, not some special, self-appointed group.[6]

It does not follow that a citizen disturbed by decisions made in administering the national lands, but lacking a discriminating, personal interest in them, could under no circumstances be found to have standing to challenge those decisions.

> While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination * * * of * * * scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government.

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[6] Of course, it is often appropriate for such a group or organization to participate as *amicus curiae* in litigation which will affect matters of interest to it, but that is very different from the issue of whether such a group has standing as a party to invoke court jurisdiction which presumably would not otherwise be invoked.

> Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest.

Associated Industries v. *Ickes, supra,* 134 F. 2d at 704.[7] Leading cases in the courts of appeals which are often cited for expanding the law of standing are characterized by just such specific congressional judgments. *E.g., Scenic Hudson Preservation Conf.* v. *Federal Power Commission,* 354 F. 2d 608, 615 (C.A.

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[7] The context of this holding was somewhat different than the present case. The plaintiffs there were consumers of coal upon whom Secretary Ickes had imposed a price increase. Under the law as it then stood, however, they had no "legally protected interest" and so would have had no standing but for statutory provisions which permitted consumers to appear in the relevant administrative proceedings, established consumer interests as among those to be protected in the administration of the statute, and permitted an appeal by any "person aggrieved" as a party to the administrative proceedings. It is apparent that these coal consumers suffered a differentiating, discriminating harm through the higher prices, and thus would be found to have standing under *ADAPSO* and like cases without regard to either "legally protected interest" or a special facilitating statute. The court's reasoning remains valid, however, for cases like this one, where such harm is not claimed.

2) (statute requires consideration of environmental and recreational factors, and permits review at behest of any "aggrieved" party); *Office of Communication of United Church of Christ* v. *Federal Communications Commission,* 359 F. 2d 994 (C.A.D.C.) (statute requires consideration of service to listening public, and permits review at behest of any "aggrieved" party).[8]

In the absence of such a legislative judgment, a citizen asserting an interest essentially limited to having the law obeyed should have no standing to sue. For if the harm done to the nation as a whole by official misapplication of national law is in itself enough to constitute "injury in fact," the concept ceases to have content, and the allied issues of standing and case or controversy, in this respect, become matters only of careful pleading. It need only be averred that the citizen is "interested" in a pending issue which he believes to have been decided against his interest to bring the matter before the court, assuming it to be otherwise reviewable.

Such an averment should be insufficient to establish the judicial character of the matter put before the court. A person with a roving commission to bring suits to challenge actions which he believes contravene an established public interest in which he shares would doubtless do so only when he felt it worthwhile to commit the necessary resources to litigation; to

[8] In *United Church of Christ*, it is also possible to isolate a discriminating or differentiating harm, that suffered by listeners subjected to discriminatory programming; in *Scenic Hudson*, as in the more recent *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F. 2d 97 (C.A. 2), certiorari denied, 400 U.S. 949, some but not all of the plaintiffs established such harm.

that extent, anyone who sues, whether he is from California or Tennessee, automatically has a "personal stake" in a controversy.[9] That stake, however, is a stake only in the issue which the citizen chooses to litigate; it lacks a "*concrete* adverseness which sharpens the presentation of issues." *Baker* v. *Carr,* 369 U.S. 186, 204 (emphasis added). A standard so malleable would invite "ill-defined controversies over constitutional issues," *United Public Workers* v. *Mitchell,* 330 U.S. 75, 90, and the bringing of cases which, because they were meant more to establish a point than to vindicate a concrete and pressing personal interest, would have a "hypothetical or abstract character." *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227, 240. There must be "a logical nexus between the status asserted and the claim sought to be adjudicated," *Flast* v. *Cohen,* 392 U.S. 83, 102, and that nexus must be sufficient to give confidence that every aspect of the situation will be explored. *United States* v. *Fruehauf*, 365 U.S. 146, 157.

Petitioner's handling of the standing issue in this case seems indicative of the kind of problems which might arise. It is apparent from the briefs of the *amici curiae,* particularly that filed by The Wilderness Society and others, that there may exist numerous, rather concrete relationships between the Sierra

[9] As Judge Frank observed in *Associated Industries*, *supra*, 134 F. 2d at 700 n. 6: "* * * [A]nyone has, in a certain sense, a 'right' to bring any kind of suit in any court; a man can institute an original action for divorce in the Supreme Court; his suit will be dismissed but he will only suffer costs, just as he would if he brought a suit in a court of proper jurisdiction and lost on the merits."

Club, its members, and one or another of the particular federal lands at issue here, which could support a claim of injury in fact. Petitioner has chosen to rely, however, only on its national interests in conservation and maintenance of public reserves and a general interest in the Sierra Nevada Mountains, where these lands are located. The effort appears to be to require the Court to decide a rather broad and sweeping question, when a narrower issue might suffice to resolve this aspect of the dispute. To be sure, counsel are entitled to shape their case as they think most likely to prevail; but the point of the Court's consistent concern for *concrete* interests on a litigant's part is to assure that these decisions are made with a view to winning the case, rather than some doctrinal point which may be thought important. If a simple assertion of interest in the problems with which an agency deals is enough to establish standing, no such assurance can be had.

Concreteness of harm is also an important factor in the presumption of reviewability, on which petitioner and the supporting *amici* lay much stress. Where a discriminating or differentiating injury has been suffered, the case for affording a right of review has already been made and it is proper to conclude that such review is not "cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140. A putative injury to the nation as a whole, on the other hand, does not invite such a response. The enforcement of public policies, in general, is placed in the hands of public officers, whose

performance is subject to review through the political processes. "To entrust the vindication of [a] public interest to a private litigant professing a special stake in the public interest is to impinge on the responsibility of the public authorities designated by Congress." *L. Singer & Sons* v. *Union Pac. R. Co.*, 311 U.S. 295, 306 (Frankfurter, J., concurring for five members of the Court). There can be no assurance that such a litigant will not misstate the interest he claims to vindicate, or abandon some other interest which Congress equally meant to be considered in the solution of the problem at hand.

We believe it follows that review on allegations of failure adequately to assess, or of harm to, the public interest ought not to be entertained in the absence of a specific congressional judgment to permit it. The remedies which Congress chooses to afford or deny are as significant a part of the statutory structure as the apparent legal framework it creates.[10] Through the enactment of "person aggrieved" statutes in connec-

[10] Underlying much of petitioner's argument is the implicit premise that only the courts are both able and willing to superintend administrative compliance with statutory mandates. Congress is equipped to oversee the administration of its laws and, in fact, does so. See *Rural Electrification Administration* v. *Central Louisiana Electric Co.*, 354 F. 2d 859, 865 (C.A. 5), certiorari denied, 385 U.S. 815. Congressional committees charged with supervising the administration of public lands continually monitor the activities of the Interior and Agriculture Departments and propose new legislation when changes are felt to be needed. Cf. *First Agricultural National Bank of Berkshire County* v. *State Tax Commission*, 392 U.S. 339.

tion with specific federal agencies.[11] Congress has shown that it knows how to provide for such review; indeed, Congress has specifically authorized citizen suits to enforce clean air standards, see Section 304 of P.L. 91–604, 84 Stat. 1706, and, as petitioners and the *amici* point out, there are bills presently pending in Congress which would confer standing on citizens and groups such as the Sierra Club with respect to a broad range of environmental-public interest issues. S. 1032, 92d Cong., 1st Sess.; H.R. 49, 5074, 6862, 8331, 92d Cong., 1st sess. Where the issue is the enforcement of statutory policy,[12] any such appointment of "private attorneys general", *Associated Industries, supra,* should, we submit, be made by Congress, not this Court.

No contention could be made that any of the Acts creating the areas in dispute here, or concerning the administration of national parks and forests in general, envisaged suits brought by private persons challenging harm to what they conceive as the public interest. All were enacted in the days of the "legal interest" test, before the possibility of such actions was contemplated. Especially in the area of public

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[11] See, *e.g.*, Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a) ("person aggrieved"); Section 24(a) of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79x(a) (same); Section 313(b) of the Federal Power Act, 16 U.S.C. 821*l*(b) (same); Section 701(f)(1) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 371(f)(1) (persons "adversely affected"); Section 1(20) of the Interstate Commerce Act, 49 U.S.C. 1(20) ("any party in interest").

[12] Where the issue is the enforcement of constitutional directives, as in the case of taxpayer suits brought to enforce the prohibitions of the First Amendment, *Flast* v. *Cohen, supra*, congressional definition of the requirements of "public interest" standing may not be required. Cf. *Bivens* v. *Six Unknown Named Agents*, No. 301, O.T. 1970, decided June 21, 1971.

lands, private individuals have no "legal interest" save as may be created in accordance with specific statutes authorizing private acquisition or use.

> Article 4, § 3, Cl. 2 of the Constitution provides that "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States." The power over the public land thus entrusted to Congress is without limitations. "And it is not for the courts to say how that trust shall be administered. That is for Congress to determine." [*Alabama* v. *Texas,* 347 U.S. 272, 273, quoting *United States* v. *California,* 310 U.S. 16, 29–30.]

For example, in the case of the national forests, Congress has required the Secretary of Agriculture to reach a balance among interests in outdoor recreation, range, timber, watershed, and wildlife and fish "in the combination that will best meet the needs of the American people." Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. 528, 531(a). No one user or group has a special interest in the Secretary's allocation among these values which would distinguish that individual or group from the public at large.[13] "All the public lands of the United States are held in trust for the people of the whole country." *Light* v. *United States,* 220 U.S. 523, 537; *Camfield* v. *United States,* 167 U.S. 518, 524; *United States* v. *Trinidad Coal Co.,* 137 U.S. 160, 170.

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[13] Under a long-standing provision, 16 U.S.C. 500, county school and road districts are entitled to 25 percent of the receipts from timber sales within their county. Whether that provision would enable such a district to secure review, for ex-

Nor do we believe that the general "persons aggrieved" provision of the Administrative Procedure Act, 5 U.S.C. 702, embodies the necessary congressional judgment. That statute confers a right of review on persons "adversely affected or aggrieved by agency action *within the meaning of a relevant statute*" (emphasis added). The clear import of the emphasized phrase is to direct inquiry about effect or aggrievement to another statute. So far as the legislative history shows, the phrase was meant only to incorporate by general reference those several statutes in which Congress had made specific reference to "persons aggrieved," rather than to expand the general scope of standing to seek judicial review—and this was the interpretation adopted by courts which first faced the question. *E.g., Pennsylvania R. Co.* v. *Dillon,* 335 F. 2d 292, 295 (C.A.D.C.), certiorari denied *sub nom. American-Hawaiian S.S. Co.* v. *Dillon,* 379 U.S. 945; *Kansas City Power & Light Co.* v. *McKay,* 225 F. 2d 924, 932 (C.A.D.C.), certiorari denied, 350 U.S. 884; *Braude* v. *Wirtz,* 350 F. 2d 702, 707–708 (C.A. 9); see also Jaffe, *Judicial Control of Administrative Action* (1965) 528–531. We have already pointed out that the initial expansion of the standing concept came under statutes where that specific reference had been made. *Supra,* p. 21. To be sure, this Court held in *ADAPSO* and

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ample, of a decision to designate certain lands a wilderness area is an issue which this court need not reach here, since no special beneficial interest in one rather than another recreational use of these lands can be claimed. We note, however, our doubt that Congress ever contemplated that even these bodies could obtain review of the Secretary's managerial decisions affecting the use of forest lands.

Barlow v. *Collins, supra,* that Section 702 operates as an independent grant of standing to all "persons aggrieved," treating the reference to "a relevant statute" as raising only the question whether the alleged aggrievement is arguably within the zone of interests to be protected or regulated by the statute in question. But, for the reasons already stated, this holding is properly regarded as limited to the issues of "injury in fact" presented in those cases. Nothing in the history of the Act indicates that by passing it, Congress intended to permit citizen suits challenging administrative action on any issue affecting "public interests." [14]

Finally, the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. (Supp. V) 4321 *et seq.*, embodies no judgment regarding standing under the Acts at issue in this case. That Act is primarily concerned with the formulation of new administrative procedures to be followed in "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. (Supp. V) 4332(C). In view of the timing of the events here at issue, petitioner makes no claims regarding compliance with the Environmental Policy Act. We are mindful that the recent expansion in the law of standing was well under way before the Environmental Policy Act was passed, so that it is ar-

[14] This conclusion seems particularly valid with respect to decisions affecting public interests in public lands. The Act specifically excludes such decisions from its rule-making requirements, 5 U.S.C. 553(a)(2), and, as here, decisions regarding allocation of public lands among competing possible public uses do not require formal adjudicatory procedures. Cf. 5 U.S.C. 554(a).

guable that its passage embodies a judgment to permit private suits to enforce its requirements. But the Acts in question here were passed at an earlier time, when, as we have shown, no such inference could be drawn. Nothing in the Environmental Policy Act deals with questions of standing under other Acts; such questions, as has already been stated, are before Congress now, and should await its particularized judgment.

B. THE SIERRA CLUB HAS NO GREATER CLAIM TO STANDING TO ASSERT PUBLIC INTERESTS THAN ANY PRIVATE CITIZEN HAS

The suggestion appears to be made that even if a private citizen has no standing to seek review of administrative decisions arguably affecting protected public interests, special interest groups such as the Sierra Club, Inc., should be recognized as having that right. We discern no basis for such a distinction. To be sure, the Sierra Club's interest in conservation matters is more focussed than that of the average citizen, just as is the United States Ski Association's interest in the development of the recreational potential of public lands. Such organizations serve a useful and salutary function in a complex society by providing rallying points for the lesser resources and partial interests of individual citizens. Still, the public interests they assert are those of the people, and if any individual in fact had the resources and interest to bring a suit such as this one, there is no reason why the court should deny him standing while according it to the organizational plaintiff.[15]

[15] Nor would there be assurance that all lawsuits challenging governmental administration of a particular project would be consolidated, or that the various courts whose jurisdiction is invoked would reach consistent results.

Even less persuasive is the apparent suggestion of the *amicus* Environmental Defense Fund (*Amicus* Br. at 33–41) that courts could develop qualifications tests for various groups which might claim to assert public interests, permitting standing only to those which were "responsible." Short of an affirmative showing that, in one case or another, there had been an abuse of process or that the group in fact did not represent the citizen interests claimed, we see no justification for judicial creation of such semi-official status. If an injury to asserted public interests is to be sufficient to support standing, then, as we have already noted, the very acts of filing and prosecuting a law suit seem to be sufficient to establish one's commitment to litigation of that issue. Moreover, any such inquiry would inevitably generate side issues of doubtful importance, but perhaps productive of substantial delay.

If an individual citizen, asserting his concern for the public interest, thereby establishes his standing to seek review of administrative action arguably affecting that public interest, then we see no reason why organizations such as the Sierra Club could not claim standing as representative of that interest. Our argument is that no individual citizen has standing to seek review on the basis merely of professed interest in rights assured by Congress to the pubic at large. Nor do we deny that in addition to its representational interests, an organization could have interests of its own which might be "injured in fact"—an interest in uncoerced membership (*N.A.A.C.P.* v. *Alabama ex rel. Patterson,* 357 U.S. 449); in financial or proprietary interests (*Pierce* v. *Society of Sisters,* 268 U.S. 510); or the

like. Petitioner, the sole plaintiff in this case, has neither claimed nor shown any harm to interests which are distinct or different from those shared by the public as a whole. Thus, in our view, it has not yet shown any "injury in fact."

C. THIS COURT SHOULD NOT NOW CONSIDER THE ASSERTIONS OF AN AMICUS CURIAE THAT THE SIERRA CLUB, EITHER IN ITS OWN RIGHT OR AS REPRESENTATIVE FOR A SUBSTANTIAL PROPORTION OF ITS MEMBERS, HAS SUFFERED INJURY IN FACT

In the course of this litigation, the Sierra Club has consistently restricted the basis for its standing claims to an undifferentiated "interest in the preservation of conservational, recreational and aesthetic values" of the public lands concerned, alleging that the planned development—although concerned only with conservation, recreation and aesthetics—will threaten that interest. We have argued above, pp. 23–25, that that stance may reflect the general dangers of alleged "public interest" litigation unsupported by a concrete stake in the outcome—that is, a concentration on framing and arguing an issue thought to be of importance, rather than winning, on whatever grounds, a case on which the judicial power may act. An *amicus* now suggests that this stance is unnecessary, that the Sierra Club may indeed have interests which would establish an injury in fact which is "distinctive or discriminating" as between the Club and its members and the public at large. See the Brief *Amicus Curiae* for The Wilderness Society and others, pp. 62–63. We submit that any such claim must be made, in the first instance, by the plaintiff itself. Moreover, even if such a claim were made at this late stage in the proceedings,

the factual issues thus raised, which may vary as to the separate causes of action alleged, are not now appropriate for resolution in this Court. See *id.* at pp. 63–66.

II

THE COURT OF APPEALS APPLIED THE CORRECT STANDARD IN DENYING SIERRA CLUB'S REQUEST FOR A PRELIMINARY INJUNCTION

There is no real dispute in this case over what is the proper standard for issuance of a preliminary injunction.

> Where the questions presented by an application for an interlocutory injunction are grave, *and* the injury *to the moving party* will be certain and *irreparable* if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted. * * *

Ohio Oil Co. v. *Conway,* 279 U.S. 813, 815 (emphasis added). But if an irreparable injury to the plaintiff has not been shown, "the party seeking a preliminary injunction has a 'burden of convincing [the court] "with reasonable certainty" that "it must succeed at final hearing" * * *.' " *Unicon Management Corp.* v. *Koppers Co.,* 366 F. 2d 199, 204–205 (C.A. 2). In particular, where a preliminary injunction is sought against public authority to restrain actions "whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the

rights of the parties, though the postponement may be burdensome to the plaintiff." *Yakus* v. *United States,* 321 U.S. 414, 440–441, and cases cited. On these standards petitioner and the *amicus* addressing the issue agree. Pet. Br. 40; Wilderness Society Br. 69–72. Since the court of appeals found no irreparable injury, it properly applied the more stringent test.

The real dispute under this heading in this case is whether an "irreparable injury" has been shown. Of course, if this project goes forward, there will be certain irreversible changes in topography, in accessibility, and, eventually, in use of the lands concerned. It does not follow, however, that the land will be rendered unaesthetic; it is clear that it will continue to be devoted to public, recreational use, albeit of a more extensive and somewhat different nature than petitioner prefers; and the court of appeals has found that all necessary steps are being taken to preserve conservational and environmental values. The question of "injury" is thus far less certain than it would be if, for example, the Secretaries had authorized a strip mine or had not provided to the extent they did for the protection of environmental values.

Moreover, under the "grave question" test which petitioner would have applied, any injury must be not only irreparable but also an injury to it, either in its organizational capacity or as representative of its members. We thus return again to the limitation which petitioner itself has introduced: the only interest claimed to be harmed is that of the public in lawful administration of public lands. The court of appeals concluded, properly in our view, that peti-

tioner had no standing to make that claim. It equally follows, we believe, that such an injury is not an injury suffered by petitioner or its members, as such. Indeed, petitioner seems to agree (Pet. Br. 42) that on the court of appeals' premise the "reasonable certainty" standard was properly applied.

Finally, even if the putative injury to the public is a sufficient basis for petitioner's claim of standing, it is necessary to consider not only that injury, but the possible injury suffered by the same public through delay of the project. In a competition between claimed public interests—in this case, competing notions of proper recreational development on public reserves—the fact that one of the alternatives has achieved administrative approval is enough to bring it within the rule of *Yakus, supra.* Even in a case between wholly private parties, one would have to consider where "the balance of injury" lies. *Prendergast* v. *New York Telephone Co.,* 262 U.S. 43, 51; *Hamilton Watch Co.* v. *Benrus Watch Co.,* 206 F. 2d 738, 740 (C.A. 2).

While the proposed changes in this case would be irreversible where they occur, they would affect barely one percent of federal forest and park lands in California, and the great bulk of the remainder remain available for petitioner's preferred uses; even within that one percent of land, steps have been taken to assure that any adverse effect will be controlled. The other side of the balance is reflected, not simply in delay in making the land available for the proposed recreational uses, but in a substantial inflation of expenses necessary to construct the project, of which this Court may surely take notice. There is no assur-

ance that a project once estimated to cost $35 million, or a road once estimated at $22 million, will cost as little once this litigation is complete. Consequently, there can be no assurance that it would then be built, even if the Secretaries' determination that the project is in the public interest and proper under governing statutes should be upheld.[16] The increased costs resulting from the delay are not readily, and have not been, compensated for by an injunction bond; and the inconvenience to the many members of the public who wish to use the new recreational facilities, should the Secretaries be upheld but the project not be built, is not "inconsiderable." Thus, even if petitioner has made out a claim of harm to it, it does not follow that the injunction should have issued. *Ohio Oil Co.* v. *Conway, supra; Yakus* v. *United States, supra.*

III.

THE MINERAL KING PROJECT DOES NOT EXCEED THE AUTHORITY TO MANAGE FEDERAL LANDS GRANTED THE SECRETARIES OF AGRICULTURE AND INTERIOR BY CONGRESS

If this Court agrees with our contention that petitioner has no standing to challenge the Secretaries' actions, no further inquiry is required. If, on the other hand, the Court concludes that the petitioner has standing, then we agree it should proceed to review the decision below on the merits of petitioner's

[16] This Court has recognized that the advantages which private parties may gain from delay in securing private interests is a reason for caution in permitting them as litigants to represent public interests. See *Amalgamated Clothing Workers* v. *Richman Brothers*, 348 U.S. 511, 519; *L. Singer & Sons* v. *Union Pac. R. Co., supra.*

claim, to the extent necessary to determine whether a preliminary injunction should issue. In this context, the appropriate inquiry, as we show above, is whether petitioner has shown a reasonable likelihood of success on the issues which it tendered. Petitioner's complaint properly limits these issues to questions of statutory and regulatory authority, and arbitrary and capricious action (A. 6–7, 8–9), and within those limits we do not contest their reviewability. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402. We note, however, that the district court and court of appeals had before them only the five issues listed in Petitioner's Brief at pp. 42–43.[17] To the extent other issues are now pressed, notably the adequacy of the administrative record supporting the authorization of the access highway (see the Brief *Amicus Curiae* for the Environmental Defense Fund, pp. 49–51), they are raised too late for present consideration.

Consideration of these issues should take place with an awareness of the geographic and historical reali-

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[17] "[W]hether:

"1. 16 U.S.C. § 497 bars long-term use of more than 80 acres of national forest land for recreational purposes.

"2. 16 U.S.C. § 688 bars a use of the lands of the Sequoia National Game Refuge which would interfere with game animals and their habitat.

"3. 16 U.S.C. § 1 bars use of a National Park for a non-park purpose.

"4. The Secretary of the Interior's Rule for Road Building in National Parks, 34 Fed. Reg. 19, bars approval by the Secretary of a highway across Sequoia National Park absent the required public hearings.

"5. 16 U.S.C. § 45(c) bars construction of a transmission line in Sequoia National Park without Congressional authorization."

ties of Mineral King. In geography, it is, we fully agree, an integral part of the lands which make up Sequoia National Park. Historically, its exclusion from the Park was based on the presence of certain private uses which Congress decided not to disturb. Its designation as a national game refuge, petitioner and its supporters correctly relate, was intended to reflect its essential identity with the Park by assuring that it would not be opened up to non-recreational uses ordinarily permitted in national forests, but which might be destructive of Park values. The Mineral King development may be quite properly viewed as a development of this integral land mass, brought about through coordination by the two Secretaries who, essentially by historical accident, share authority over its two parts. Its proposed use as "a public park, or pleasure ground, for the benefit and enjoyment of the people," Sequoia National Park Act, 26 Stat. 478, 16 U.S.C. 41, serves the whole of the public lands involved.

These lands, of course, will remain public domain lands; the proposed Disney development would not, and could not, alter this. They are merely leased to a concessionaire for a specified use, which must conform with safeguards established and enforced by the respective Secretaries. Access to the lands—although not to the services which the concessionaire may offer—may not be made subject to the payment of a fee. And the amount of land actually occupied by the concessions is limited:

On 20 acres (now occupied by 36 summer houses) will be a reception center with service and mainte-

nance facilities; a railroad station with luggage handling facilities for transportation between the reception center and the village; a general store; a hospital; fire station; warehouse; commissary; gondola lift station with ski sale and rental shop; administrative facilities; and a five-acre underground parking lot.

A 25-acre area will contain hotels, apartments, and dormitories; a railroad station; a gondola lift station; two ice-skating rinks; swimming pools; a first-aid station; and an information center.

A 20-acre area will contain stables and corrals; railroad, water and sanitation facilities; married employees' housing; lift terminals; valley utility lines; sanitation drain fields; and a debris control drain.

These areas are all covered by the 30-year term permit which all agree the Secretary of Agriculture has authority to issue, for areas up to 80 acres in a national forest, for "hotels, resorts, and any other structures or facilities necessary or desirable for recreation." 38 Stat. 1101, as amended, 16 U.S.C. 497. In addition, Disney is to receive a non-exclusive, revocable permit for less than 400 acres to be used for ski lifts and runs, certain of the sanitation facilities, and the like. These 400 acres are distributed over the Valley as a whole, and in that respect "affect" as much as 13,000 acres, just as walking trails through the Valley would; but 400 acres marks the limit of even the slight disturbances of the earth's surface contemplated under the revocable permit. Finally, the Secretary of the Interior has agreed to grant California a special use permit for the strip of land, "not

exceeding an average of 200 feet in width" (Appendix A, *infra*, p. 67) and without use of any other Park lands for any other construction purpose (*id.* at p. 75), necessary for the access road.

A. THE SECRETARY OF AGRICULTURE HAS AUTHORITY TO COMBINE FIXED TERM AND REVOCABLE USE PERMITS IN ORDER TO PERMIT THE OPERATIONS OF SKI RESORTS ON NATIONAL FOREST LANDS

Article IV, Section 3, of the Constitution gives Congress plenary power to dispose of the property of the United States. *Ruddy* v. *Rossi*, 248 U.S. 104, 106. The broad power of Congress over the public lands includes "the power to control their occupany and use * * *." *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 405. As this Court stated in *Gibson* v. *Chouteau*, 13 Wall. 92, 99:

> With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. * * *

See also *United States* v. *San Francisco*, 310 U.S. 16, 29–30; *United States* v. *California*, 332 U.S. 19, 27; *Standard Oil Co. of California* v. *United States*, 107 F. 2d 402, 409 (C.A. 9), certiorari denied, 309 U.S. 654.

This power is delegable and Congress has delegated to the Secretary of Agriculture authority "to regulate [the] occupancy and use" of the national forests. Organic Administration Act of June 4, 1897, 30 Stat. 35, as amended, 16 U.S.C. 551. The Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C.

528, directs him to balance the many potential uses of national forest lands, "outdoor recreation, range, timber, watershed, wildlife and fish purposes," under a sweeping mandate that requires him to determine policies "that will best meet the needs of the American people." 74 Stat. 215, 16 U.S.C. 531(a).

The occupancy and use of national forest lands and resources, of course, has been by private persons, operating under concessions granted by the Secretary. One type of concession is specifically provided for by statute. Congress has authorized the Secretary to issue term permits of up to 30 years for forest areas of up to 80 acres for "hotels, resorts, and any other structures or facilities necessary or desirable for recreation." 38 Stat. 1101, as amended, 16 U.S.C. 497.

A second type of concession arises under more general authority. The Secretary is granted broad regulatory powers under 30 Stat 35, 16 U.S.C. 551, including a specific mandate to "make such rules and regulations and establish such service as will insure the objects of such reservations [the public forests and national forests], namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." For more than a half century, dating back before the first grant of term permit authority, the Forest Service has regularly issued revocable permits based on Section 551 covering lands under its supervision. These permits have covered such special uses as residences, farms, airfields, fish hatcheries, camps, resorts, ski lifts and tows, schools, mills, stores, observatories, rifle ranges, dams and reservoirs. See Hear-

ings before the Subcommittee on Forests of the House Committee on Agriculture, 90th Cong. 1st Sess., Ser. J, pt. 2 (1967), at p. 2; Hearings on H.R. 1809 Before Subcommittee No. 2 of the House Committee on Agriculture, 80th Cong., 1st Sess. (1947), at pp. 2–6.

Even after Congress authorized term permits, the Forest Service continued frequently to employ revocable permits for a wide array of uses. This reflected a consistent Department policy of limiting a permittee's tenure by means of the revocable permit; term permits were, as a general rule, only sparingly issued. Moreover, the original statute authorized term permits for a maximum of five acres, so that revocable permits were sometimes needed to provide the permittee sufficient acreage for the desired use. It became apparent, however, that prospective permittees often could not obtain adequate financial assistance for their development plans where the proposed use, because of the acreage needed, required a revocable permit. Modification of Department policy to favor term permits was not enough to overcome this difficulty. Rather the need was for broader term permit authorization, to allow more acreage to be covered under that type of permit. Congress responded to the problem in 1956 by increasing the acreage limitation for term permits under 38 Stat. 1101, 16 U.S.C. 497 to the present level of eighty acres. Significantly, in recommending that this be done, the congressional committees explicitly recognized the agency's broad revocable permit powers:

> The Department of Agriculture now has adequate authority to issue revocable permits for

all purposes under the act of June 4, 1897 (16 U.S.C. 551).[18]

Congress has indicated its awareness of the Secretary's use of revocable permits on other occasions as well. Proposals to broaden the term permit authorization under 16 U.S.C. 497 have invariably included declarations that the Secretary could issue and was issuing revocable permits irrespective of the limits applicable to term permits, on the authority of "[t]he general laws relating to * * * national forests." S. Rept. No. 754, 72d Cong., 1st Sess. (1932), at p. 2; see also H. Rep. No. 805, 80th Cong., 1st Sess. (1947), at p. 2; S. Rep. No. 899, 80th Cong., 2d Sess. (1948), at p. 2; H. Rep. No. 1742, 83d Cong., 2d Sess. (1954), at p. 2; Hearings on H.R. 1809 Before Subcommittee No. 2 of the House Committee on Agriculture, *supra,* at pp. 2, 6. As recently as 1967, the Secretary advised

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[18] S. Rep. No. 2511, 84th Cong., 2d Sess. (1956), at p. 1; H. Rep. No. 2792, 84th Cong., 2d Sess. (1956), at p. 2.

The acreage increase amendment was finally enacted in 1956, more than twenty-five years after the Department first brought the problem to Congress' attention. During the intervening years, the Department reiterated to Congress its concern that the original term permit authorization under 38 Stat. 1101, 16 U.S.C. 497 imposed acreage limitations that were too restrictive. In every instance, however, this concern was couched in terms of the problems this caused permittees, by reason of their inability to obtain needed financial help; throughout the legislative deliberations concerning this matter, the Department repeatedly made clear its practice of issuing revocable permits under the broad authorization in 30 Stat. 35, 16 U.S.C. 551, without regard to the limitations imposed on term permits by 16 U.S.C. 497. See, *e.g.*, S. Rep. No. 754, 72nd Cong., 1st Sess. (1932); H. Rep. No. 805, 80th Cong., 1st Sess. (1947); S. Rep. No. 899, 80th Cong., 2d Sess. (1948); H. Rep. No. 1742, 83d Cong., 2d Sess. (1954); S. Rep. No. 2511, *supra;* H. Rep. No. 2792, *supra.*

Congress of the broad range of activities for which term and revocable permits had been issued, and of the extensive improvements that permittees under those permits had constructed. Hearings Before the Subcommittee on Forests of the House Committee on Agriculture, *supra,* at pp. 2–3. Forest Service officials gave the details: 63,000 term and revocable permits covering 80 different types of uses had been issued, of which approximately 53,000 involved permittee-built and owned improvements for such uses as airports, bathhouses, mills, observatories, rifle ranges, schools, stores, and ski-tows; the estimated value of these improvements exceeded $1 billion. *Id.* at p. 4. Officials explained that while the figures included both term permits and revocable permits, the latter were far more common: "Of all special-use permits, about 15 percent are term and 85 percent are terminable [revocable]." *Id.* at p. 13. There can, in sum, be no doubt that over the years Congress has known of and on numerous occasions has tacitly ratified the Secretary's extensive revocable permit practice.

Petitioner and its supporters argue that these two types of permits, term and revocable, cannot be combined—essentially, that conjoining them amounts to an evasion of the acreage limits provided in 38 Stat. 1101, 16 U.S.C. 497, which, they say, Congress meant to be absolute. But again, this has been a long-standing administrative practice, which Congress, though well aware of it, has never questioned. As early as 1932, the Secretary explained to Congress that "sup-

plemental terminable [revocable] permits" were being issued to a term-permit permittee, to provide him with sufficient total acreage under both types (term and revocable) "to permit of the proper development." S. Rep. No. 754, *supra,* at p. 2. This was reemphasized during congressional consideration in 1947 of the Secretary's request for expanded term-permit authority:

> [U]nder our present set-up, where the acreage exceeds 5 [the then-applicable limit of term-permit authority under 16 U.S.C. 497], we have to split the permit, give them [the permittees] one term permit under our existing authority for not more than 5 acres, and the rest of the undertaking has to be covered by the terminable type of permit, which is terminable at the discretion of the Chief of the Forest Service.

Hearings on H.R. 1809 Before Subcommittee No. 2 of the House Committee on Agriculture, *supra,* at p. 3; see also *id.* at p. 9.[19]

Congress evinced no intention to alter this practice when finally in 1956 it amended Section 497 to

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[19] The Department has combined the revocable permit with other types of term permits as well. A revocable permit often was used to supplement a term permit grant of a power transmission easement under 36 Stat. 1253, 16 U.S.C. 523. In 1952, Congress expanded the Secretary's powers under Section 523 by authorizing term permits for substantially wider easements. Act of May 27, 1952, 66 Stat. 95. At that time, Congress also was advised of the Department practice of issuing revocable permits solely on the authority of 16 U.S.C. 551, and the committees noted their concurrence. S. Rep. No. 1224, 82d Cong., 2d Sess. (1952), at pp. 1, 3–4; H. Rep. No. 1848, 82d Cong., 2d Sess. (1952), at pp. 2, 3–4.

broaden the term permit authorization. The Secretary had sought expanded term permit powers on numerous earlier occasions. In every instance, he had explained that this was needed because of the difficulties permittees under revocable permits had encountered in obtaining financial assistance to build large-scale improvements on acreage covered by a revocable permit; that type of permit, whether by itself or in combination with a term permit, did not provide the "certainty of tenure" required by financial institutions. See the authorities cited at note 18, *supra;* Hearings on H.R. 1809 Before Subcommittee No. 2 of the House Committee on Agriculture, *supra,* at pp. 2, 9. The same reason was reiterated in 1956. See S. Rep. No. 2511, *supra,* at p. 3; H. Rep. No. 2792, *supra,* at p. 3.

Department officials did indicate to Congress that increased term permit acreage authorization would diminish the need also to issue revocable permits in order to provide the total acreage necessary for particular developments. But there is no indication that either the Department or Congress thought the amendment would destroy the revocable permit practice. Instead, it was emphasized that this practice had existed for many years, without regard to the restrictions of Section 497. Moreover, the availability of both types of permit, for use separately or in combination, is still important to assure agency flexibility, so that, in accordance with long-standing policy, the term permit can be issued only where absolutely necessary, with the balance of the needed acreage being covered by a revocable permit. Finally, as we note above, in the course

of the amendment's enactment, the congressional committees specifically recognized that the Secretary had "adequate authority" for this practice under 16 U.S.C. 551. S. Rep. No. 2511, *supra,* at p. 1; H. Rep. No. 2792, *supra,* at p. 2. From all this, we think it is clear that no change in the Department's revocable permit powers resulted from the 1956 amendments.

Nor would any other conclusion be consistent with the just expectations of the many permittees who have relied on the Department's long-standing and consistent permit practice. In 1956, at the time of the amendment, numerous uses were authorized under combined term and revocable permits, frequently involving acreage in excess of the 5-acre pre-amendment limit and even the 80-acre limit sanctioned by the amendment.[20] This practice has continued to the present; there are now some 84 use authorizations under combined term and revocable permits for recreational developments alone, involving millions of dollars in

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[20] Department officials advise that recreational use authorizations combining term and revocable permits outstanding in 1956 included the following:

(1) Ducey's Bass Lake Lodge, in the Sierra National Forest, California—term permit for 5 acres, and revocable permit for 15 acres.

(2) Pinecrest Lodge, Inc., in the Stanislaus National Forest, California—term permit for 4.2 acres, and revocable permit for 8.32 acres.

(3) Dodge Ridge Corporation, in the Stanislaus National Forest, California—term permit for 5 acres, and revocable permit for 545 acres.

(4) Mammoth Mountain Ski Area, in the Inyo National Forest, California—term permit for 5 acres, and revocable permit for 1,000 acres.

permittee-owned improvements.[21] In many of these instances, as in the present case, the revocable permit is an essential supplement to the term permit, since without the additional acreage provided under the former the development would not be economically viable. Congress could hardly have intended to abolish the Secretary's authority to issue such revocable permits with the resulting unsettling effects on permittee investments without more explicit action on its part than was taken in connection with the 1956 amendment.

Petitioner and its supporters, apparently anticipating this problem, state that their argument will have no necessary effect on the many existing developments which combine term and revocable permits. On examination, this contention is questionable in the extreme. The determinative issue on this aspect of the case is whether the Secretary has the *authority* to issue to one permittee both a term permit and a revocable permit, where, in combination, they encompass more than 80 acres, the maximum area sanctioned for a term permit. If he lacks such authority, then it follows that all permits issued in violation of the statutory strictures

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[21] See Appendix B, *infra* pp. 80–81. The Department estimates the total value of improvements constructed and owned by permittees at these areas to be approximately $70 million. In addition to the listing in Appendix B, two ski resorts have been developed under only revocable permits. The Mount Snow area in the Green Mountain National Forest, Vermont, involves some 911 acres, on which the permittee has constructed improvements worth $2.9 million. Multorpor Ski Bowl at Mount Hood National Forest, Oregon, covers 640 acres and has permittee improvements worth more than $800,000.

are unauthorized, and as such might properly be found to be void and of no force and effect.[22]

This is especially so with respect to revocable permits that, under petitioner's view, have been improperly issued in combination with term permits; the Secretary would be under a virtual duty to revoke them at once, if they are unauthorized. Nor would existing concessionaires who have made large investments in reliance on a revocable permit be entitled to different treatment. We have difficulty understanding how the government could properly adopt the inconsistent position that these unauthorized "revocable" permits are wholly invalid, and yet some special equity entitles some or all present holders to continue their use. Compare *Utah Power & Light Co.* v. *United States, supra* 243 U.S. at 408–409; *United States* v. *California,* 332 U.S. 19, 39–40. Nor is it a distinction that in some existing developments no permanent facilities have been constructed outside the 80-acre term permit area, and that only such things as ski trails are in the revocable permit areas. Ski runs are as essential to the operation of a ski resort as its ski lifts and other permanent facilities, and the use of national forest lands for a commercial ski trail is not allowed without a permit. Since the total area occupied by all uses which require a permit and which are necessary for the project to function as an economic unit must be considered in determining if the statutory acreage restrictions are

[22] Since the issue is entirely one of statutory authority and legislative intent, it does not seem appropriate for the application of a non-retroactivity doctrine as suggested by *amicus* The Wilderness Society (Br. 101, n. 40).

exceeded, the legality of all present ski resort developments, and the status of the large investment they represent (see n. 21, *supra,* and Appendix B, *infra*), would be in question.

Finally, it is significant that revocable special use permits, such as the one proposed here, are revocable at will. By its terms, the proposed permit "may be terminated upon breach of any of the [numerous] conditions herein or at the discretion of the regional forester or the Chief, Forest Service" (see sample permit at App. 24, Clause 15). Thus, Department officials would have the *power* to revoke it at any time, notwithstanding that it would be closely tied to the proposed term permit. While the Department has been cautious in exercising its power to revoke permits of this type, it has done so where the public interest requires. See Hearings on H.R. 1809 Before Subcommittee No. 2 of the House Committee on Agriculture, *supra,* at p. 3; Hearings Before the Subcommittee on Forests of the House Committee on Agriculture, *supra,* at pp. 5, 9–15. Agency policy in this regard has been consistent, and assures that the less than 400 acres (not 13,000, as petitioner and its supporters suggest) to be covered by the revocable permit would remain under close governmental control.[23]

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[23] The procedures established by the Department for terminating permits apply to termination of revocable permits, as petitioner and its supporters point out. See 36 C.F.R. 251.1(b)(3). These provisions do not, however, make the revocable permit any less revocable. Section 2716.3–2 of the Forest Service Manual explicitly provides for discretionary termination of revocable permits. See *In re Sherman C. Smith*, 1 U.S.D.A. Board of Forest Appeals Decisions and Rulings under the

B. THE CONSTRUCTION OF RESORT FACILITIES ON LESS THAN 80 ACRES, AND OF SKI TRAILS AND LIFTS ON LESS THAN 400 ACRES, OF THE 15,000 ACRE SEQUOIA NATIONAL GAME REFUGE IS NOT INCONSISTENT WITH THE PURPOSES FOR WHICH THE GAME WAS CREATED

Measures to protect and preserve the broad expanse of public domain surrounding and integrally related to the Mineral King Valley date back many years. In 1890, Congress established Sequoia National Park, just north of the Valley. The Valley was first designated as national forest lands in 1893, as part of the Sierra Forest Reserve. It became part of Sequoia National Forest in the early 1900's. During the ensuing years proposals were made to include the Valley in an enlarged Sequoia National Park. Forest Service officials recommended against including within the Park mineral and merchantable timber lands, such as the Valley. See Hearings on H.R. 5006 Before the House Committee on Public Lands, 66th Cong., 2d Sess. (1920), at pp. 35–36, 38–39; Hearings on H.R. 9387 Before the House Committee on Public Lands, 69th Cong., 1st Sess. (1926), at pp. 57–58. When Congress finally enlarged the Park boundaries in 1926, it followed this recommendation and excluded the Valley, so that it remained national forest lands.

In doing so, however, Congress recognized that the Valley is closely related to the lands which make up

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Forest Service Appeals Regulations 433 (1967). As that decision emphasizes, a revocable permit is terminable "at pleasure," notwithstanding the procedures required to be followed in making the termination decision; those procedures are intended only to assure that the official's acts are "guided by reason," rather than mere "whim or caprice." *Id.* at 441–442.

the Park. While the "mineralized" character of the Valley's territory militated against including it directly within the Park, yet it was almost completely encircled by the Park's expanded boundaries and shared its topography and general nature. Because of this, it was urged that the Valley's management, and specifically its game conservation policies, should be consistent with that of the Park. *Ibid.* Congress responded by designating the Valley a part of the Sequoia National Game Refuge. 44 Stat. 821, as amended, 16 U.S.C. 688.

Thus, the legislative objective was to associate the Valley with the Park as regards administration and policies. There was no indication that the Valley was to be less accessible than the Park itself; there was no intent to make it virtually a wilderness area, as petitioner and its supporters would prefer.

Indeed, all indications are to the contrary. Forest Service officials informed Congress that the Valley should continue to be available for the uses permitted on national forest lands even after its designation as a game refuge (Hearings on H.R. 9387 Before the House Committee on Public Lands, *supra,* at p. 58). Congress made explicit provision for this in 16 U.S.C. 688, thus evincing its determination that the Valley would be subject to the broad and extensive use provisions generally applicable to national forests.

The statute does direct that national forest uses in the Valley shall be consistent with the purpose for which it was designated a game refuge—"to protect from trespass the public lands of the United States and the game animals which may be thereon." 16 U.S.C. 688. But recreation facilities such as here

planned are not inconsistent with this purpose. In this regard, we think petitioner places undue emphasis on the extent of physical disturbance of the land—though even on this basis petitioner's objections are wide of the mark, since in fact only some 3 percent (approximately 465 acres) of the Valley's total area (15,000 acres) would be even slightly altered. More significant, in our view, is the extent of the planned human presence and whether that is at odds with the statutory scheme. While petitioner's concern might properly assume greater importance if the Valley were designed to be a wilderness area, that is not this case; the mere designation of public lands as a game refuge, as here, has never been thought to necessitate the exclusion from such areas of people or of facilities to provide for their recreation and enjoyment. In fact, the Secretary has consistently authorized private concessionaires to construct recreational facilities, costing substantial amounts, on game refuge lands.[24]

Moreover, the use restrictions applicable to forest lands because of their designation as game refuges are no greater than those applicable to national park lands generally, and to Sequoia National Park lands in particular. Compare 26 Stat. 478, 16 U.S.C. 41; 26 Stat. 478, as amended, 43; 44 Stat. 820, 45b; and 41 Stat. 731, 16 U.S.C.

[24] Recreation facilities have been authorized in George Washington National Forest, Virginia; Ocala National Forest, Florida; Ozark National Game Refuge, Arkansas; Ouchita National Wildlife Preserve and Game Refuge, Arkansas; Kisatchie Game Refuge, Louisiana; and Pisgah Game Refuge, North Carolina.

with 44 Stat. 821, 16 U.S.C. 688 and 48 Stat. 400, 16 U.S.C. 694.[25] It follows that any use that would be proper on park lands would be proper in the Valley. And there can be little doubt that the proposed development fully accords with general national park purposes. National parks, after all, are for the public to enjoy; to this end, the parks should be developed to encourage and provide for their use by as many members of the public as is reasonably practicable, so long as that does not impair enjoyment of park lands by future generations. Indeed, Congress has, accordingly, expressly approved the providing of "public accommodations, facilities, and services" on national park lands, without limit as to area, where, as here, the proposed project is carefully planned and supervised. 79 Stat. 969, 16 U.S.C. 20, 20a. In accordance with this statutory policy, six ski and recreation areas currently have been developed by private concessionaires on sizable areas of national park lands.[26]

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[25] While the Wilderness Society, et al. emphasize 48 Stat. 400, 16 U.S.C. 694 (Br. 87), it is doubtful that that provision applies here, in view of 44 Stat. 821, as amended, 16 U.S.C. 688 which specifically deals with the Sequoia National Game Refuge (of which the Valley is a part).

[26] These developments are located in seven different national parks. In each instance, the recreational facilities cover large areas of park land, and include ski tows, lifts, and runs. The parks and the estimated value of permanent concessionaire improvements are as follows: (1) Mount Rainier National Park, Washington: $76,901; (2) Sequoia and Kings National Parks, California: $1,393,999; (3) Yosemite National Park, California: $14,831,884; (4) Olympic National Park, Washington: $651,089; (5) Lassen Volcanic National Park, California: $579,494; and (6) Rocky Mountain National Park, Colorado: $186,670.

C. THE CONSTRUCTION OF AN ACCESS ROAD THROUGH THE SEQUOIA NATIONAL PARK, CAREFULLY CONTROLLED FOR ITS IMPACT ON THE PARK AND WITH PROVISION FOR USES WITHIN THE PARK, IS WITHIN THE AUTHORITY OF THE SECRETARY OF THE INTERIOR TO PERMIT

Congress has delegated to the Secretary of the Interior "plenary authority over the administration of [the] public lands." *Best* v. *Humboldt Mining Co.*, 371 U.S. 334, 336, 337–338; *Boesche* v. *Udall*, 373 U.S. 472, 476–477 n. 6. Supplementary to the Secretary's general power, Congress has directed him to "promote and regulate the use of the * * * national parks," to "grant privileges, leases, and permits for the use of land" in the parks, to construct roads in national parks, and to cooperate with the Secretary of Agriculture in administering contiguous national forests. Organic Act of the National Park Service of August 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. 1, 2–4, 8. Acting under this authority, the Secretary proposes to authorize the State of California to construct an access road to Mineral King Valley, replacing the existing substandard road, subject to stringent conditions and supervision for the protection and enhancement of the Park.

A motivating factor in construction of this road is to permit easier access to Mineral King, although ample provisions are also made for enhancing use of the Park itself.[27] Nonetheless, we believe that peti-

[27] The Secretary is specifically authorized (43 Stat. 90, 16 U.S.C. 8) "to construct, reconstruct, and improve roads * * * in the national parks." This broad power, petitioner and its supporters concede, permits all road construction that is in fact for "park purposes." To a significant extent, the new road would directly

tioner and its supporters distort this case when they state the question broadly as being whether the Secretary of the Interior can authorize a freeway through a National Park, to serve commercial facilities. For their statement overlooks several salient factors, which considerably narrow the case and make the Secretary's authority clear: the road replaces an existing access road; the rights given are explicitly made not subject to expansion, and are subject to extraordinary safeguards which assure against destruction of park values; the road gives access only to other public lands also devoted to public recreational use; the history of the particular area shows that those other public lands and their use were intended by Congress to be integral with the Park. In any non-technical sense, it is clear that this road serves *only* a Park purpose. Whatever the Secretary's authority to facilitate access through National Parks to cities, factories or gravel pits, on the narrow question of his authority to permit this road the answer is clear.

An existing access road crosses the Park to the Mineral King Valley, along the same general route that the new road would follow. The present road crosses slightly more than 9 miles of Park land and provides the only surface access to the Valley. It is very narrow and substandard and includes a number of sharp switchbacks; most of its surface is oiled dirt

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serve the needs of the Park itself. It would enhance the public's opportunity to enjoy the Park, through improved access to it; it would also include construction of scenic overlooks and roadside parking areas, and involves interchanges and connections with other Park roads (Appendix A, *infra*, Clauses 20, 35).

with several short sections consisting of only a graded roadbed. During part of each winter the road is closed at higher elevations. Average daily traffic on the road now is estimated at 95 vehicles; it plainly is inadequate to handle a large number of vehicles or to accommodate travel throughout the year. (App. 28, 60, 144.)

The Secretary's proposed authorization of the new road comports fully with his broad responsibilities and with the particular history and development of this area. Of course, the Secretary's primary duties relate to the national parks and other areas under his direct supervision. But Congress, in delegating responsibility over various portions of the public domain to different federal officials, was not unmindful that coordination between these officials is essential. Accordingly, it is expressly provided that the Secretaries of Agriculture and Interior are to cooperate in the supervision, management and control of contiguous lands under their respective control. See 39 Stat. 535, as amended, 16 U.S.C. 2; compare 46 Stat. 1054, 16 U.S.C. 8c. The new road, to be built along substantially the same route as the old one and to provide greatly improved access to contiguous national forest lands in the Valley, all subject to governmental control to assure full and adequate protection of environmental values, is no more than a fulfillment of this obligation.[28]

Certainly this is the situation in the circumstances

[28] The Secretary has authorized roads through national park lands to facilitate access to adjoining national forest lands on other occasions as well. Examples are: (1) Pacific Creek Road, Ramshorn Ranch Road, and Kelly Road, through Grand Teton National Park to Teton National Forest; and (2) West Pros-

here, in light of the long-standing association of Park and Valley lands and their closely coordinated administration (see *supra*, pp. 51–52). The Valley has always been integrally related to the Park in terms of topography and nature. By designating the Valley a game refuge, Congress explicitly concurred in the judgment that the Park and the Valley should be administered as a consistent whole. Indeed, during Congressional consideration of proposals to enlarge the Park, it was specifically noted that the "Mineral King Valley is a natural course for roads or trails" to the southeastern section of the expanded Park. Hearings on H.R. 5006 Before the House Committee on Public Lands, *supra*, at p. 74. Since the expansion of the Park, both the Park and the Valley have been devoted to the same basic purpose, to provide outdoors enjoyment and recreation for the public, and the Mineral King Valley road has served as an essential part of the overall road network for the region. In this setting, then, the new road serves only Park purposes, in the broader sense required by the history of this particular area, since it will provide better and greater access to the entire area.

Finally, the proposed new road would not pose any real dangers to the park lands. After all, a road through the Park already exists, and the proposed road would be built along or substantially parallel to the present roadbed as a replacement of the exist-

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pect Peak Lookout Road, through Lassen National Park to Lassen National Forest.

The West Prospect Peak Lookout Road goes through the Park to a fire lookout in the Forest. It has no connection with any other Park roads and does not serve any area within the Park.

ing road. At each step, extraordinary safeguards to provide against destruction of Park values have been, or would be, taken. Professor Hartesveldt's ecological study reported that construction of the proposed road would not damage the Park's sequoias, provided stated precautions were taken; only after receiving this assurance did the Secretary agree to authorize California to build the new road, specifically subject to the Hartesveldt recommendations (Appendix A, *infra,* Clause 26). More generally, the permit requires that "[d]esign and construction must afford * * * protection" for environmental features (Clause 16). And all federal and state standards for controlling and eliminating air and water pollution must be met (Clause 34). The state has agreed that if the new road is not adequate to handle the increased traffic, it will not seek any further improvement of the road through the Park, but instead will provide for such traffic by other means (Clause 37). All phases of the design and construction of the road are subject to departmental supervision and control (Clauses 1, 6, 9, 10, 12, 16, 20, 21, 22, 23, 25, 26, 28, 29, 35). In these circumstances, construction of the new road would pose no significant risk of harm to the Park or park values.

Nor would the planned recreation facilities that occasioned the construction of the new road be inconsistent with the public purposes served by both Park and Valley. Such facilities have long been permitted in both national parks and national forests (including forest lands designated as game refuges, like the Valley). See *supra,* pp. 52–54.

The fact that the Valley would be developed by a private concessionaire, rather than the Forest Service itself, is immaterial, since the concessionaire would be operating under a permit issued by the Service to implement a developmental plan approved by it. The only real question concerns accessibility to the Valley and whether the Secretary would overreach his authority in allowing construction on Park lands of a replacement road that would improve that accessibility. Improved accessibility does not conflict either with the Valley's status as forest and game refuge lands or with the broader purposes for which the Park and the Valley have been jointly set aside and administered. As we pointed out above (see *supra*, pp. 52–54), there is no indication that Congress intended to restrict in any way public enjoyment of, or access to, these areas; thus, providing for full use of them by the public is an entirely proper objective. The new road would further this objective.

D. THE PROVISION FOR A SUBMERGED ELECTRIC TRANSMISSION LINE, WITHIN THE ROAD PRISM, TO CARRY ELECTRIC CURRENT TO MINERAL KING IS ALSO PROPER

Although the issue was not included in the allegations in its complaint, Sierra Club's memorandum in support of summary judgment challenged the Secretary of the Interior's power to authorize a transmission line across Sequoia National Park. The Act of February 15, 1901, 31 Stat. 790, as amended, 16 U.S.C. 79, authorizes the Secretary to grant revocable rights-of-way "through" Sequoia National Park "for electrical plants, poles, and lines for the generation and distribu-

tion of electrical power, and for telephone and telegraph purposes * * *." See also 31 Stat. 790, as amended, 43 U.S.C. 959. Ten years later, in 1911, Congress delegated to the head of each department having jurisdiction over public lands the authority to grant *term* rights-of-way "over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power * * *." Act of March 4, 1911, 36 Stat. 1253, as amended, 16 U.S.C. 5.

Despite this seemingly clear-cut authorization, petitioner and its supporters argue that only Congress can authorize the transmission line here because of the following proviso in 44 Stat. 820, 16 U.S.C. 45c, which applies specifically to Sequoia National Park:

> * * * *Provided* That no permit, license, lease or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress.

The background of the proviso, we believe, fully answers this contention, and shows that the proviso was aimed only at excluding from the park large hydroelectric power projects, not limited transmission facilities such as that planned here.

The proviso to Section 45c followed enactment in 1921 of a provision for direct congressional control over the licensing powers of the newly created Federal Power Commission with respect to designated public

lands (Act of March 3, 1921, 41 Stat. 1353, as amended, 16 U.S.C. 797a):

> * * * [N]o permit, license, lease, or authorization for dams, conduits, reservoirs, powerhouses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power, within the limits as constituted March 3, 1921, of any national park or national monument shall be granted or made without specific authority of Congress.

This provision had but one purpose—to withdraw from the Power Commission authority that inadvertently had been delegated to it, to permit, without express congressional approval, development of the water power located within national parks and monuments. See 60 Cong. Rec. 403–404 (1920); *id.* at 2002, 3789, 4204 (1921).

In 1926, Congress expanded Sequoia National Park to include large areas of the surrounding High Sierra country. In part, at least, this resulted from increasing public concern that the areas involved might be subjected to development for hydroelectric power purposes, with the accompanying damming of rivers and flooding of valleys; indeed, a number of proposals for such development in this general area had been made in earlier years. Hearings on H.R. 7452 before the House Committee on Public Lands, 67th Cong., 2d Sess. (1921), at pp. 7–8, 12, 18. See H. Rep. No. 583, 67th Cong., 2d Sess. (1922), at pp. 2–3. Interests favoring such development opposed original plans for expanding the Park, but dropped their opposition when the lands on which projects of that type were

most likely to be located were excluded. S. Rep. No. 1080, 69th Cong., 1st Sess. (1926), at p. 2; H. Rep. No. 902, 69th Cong., 1st Sess. (1926), at p. 2.

The proscriptive language of the 1921 Act limiting the Power Commission's license authority with respect to park lands was copied verbatim into the 1926 statute expanding Sequoia National Park, and, as codified, became the proviso to Section 45c. A suggestion that this be done was first made in connection with an earlier proposal to enlarge the Park, at about the time the 1921 Act was passed; it was explained that a restriction like that in the 1921 Act should be included in the Park expansion statute for the same reason it was in the Act, to "prohibit the development of hydroelectric power in the proposed enlarged park except by special act of Congress." H. Rep. No. 583, *supra,* at p. 2. See also Hearings on H.R. 7452 Before the House Committee on Public Lands, *supra,* at pp. 8–15.

The focus throughout the legislative deliberations dealing with these matters was on preventing large-scale operations aimed at exploiting the sources of water power located in national parks and monuments. The inclusion in these statutory provisions of a reference to "transmission lines" should be read in this context. Such lines are prohibited, we submit, only if they are part of a hydroelectric power complex to be built on park land. There is no indication that Congress intended in effect to repeal its earlier authorization under the 1901 and 1911 Acts, empowering the Secretary to grant rights-of-way and permits for electric power lines on public lands. Accordingly, the court

of appeals properly concluded that the Section 45c proviso does not bar the power line contemplated here.

It is now suggested, however, that the issue under these statutes is whether the line should be denominated "transmission" or "distribution" in a technical sense.[29] But, even assuming that this is the proper standard and that viable issues of fact relating to it have been raised, that question would not warrant the issuance of a preliminary injunction in this case. As in the matter of the road, this question should be viewed in the perspective of the precise use being authorized. There is here no massive transmission facility carrying power to a distant city. Again, in the broad sense, all the power is to serve the Park—that is, the Mineral King Valley which was excluded from the Park for reasons irrevelant to the matter at hand, and which Congress clearly sought to associate, for most purposes, to the Park by its designation as a game refuge. It is conceded that congressional approval is not required for lines that would transmit power into the Park and distribute that power within it (Pet. Br. 80; The Wilderness Society Br. 120–122); as in the case of the road, this line should be treated as such a line. And the requirement that it be buried within the road right-of-way gives full assurance against any independent harm to the Park or park values.

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[29] See The Wilderness Society Br. 122. The suggestion that the line will, in fact, be carrying a higher volume of power than the record shows (69 kilowatts, rather than 66 kilowatts) is gratuitous and unsupported.

E. THE SECRETARY OF THE INTERIOR EFFECTIVELY REVOKED A REGULATION ADOPTED BY HIS PREDECESSOR

On January 29, 1969, the Secretary of the Interior adopted and published regulations governing the building of roads in National Parks. 34 Fed. Reg. 1405. Those regulations were adopted pursuant to his authority under the National Park Service Act, 39 Stat. 535, 16 U.S.C. 3, to "make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks * * *." Their adoption was not preceded by a notice of proposed rule-making, a statement of the time, place, or nature of public rule-making proceedings, or an opportunity for the public to participate in the proposed rule-making. Notwithstanding these departures from the ordinary requirements of rule-making under the Administrative Procedure Act, 5 U.S.C. 553, the new rules were valid. Because they concerned the management of public property by the Department of the Interior, the rules were exempt from those requirements. 5 U.S.C. 553(a)(2); *Duesing* v. *Udall,* 350 F. 2d 748, 752 n. 4 (C.A.D.C.), certiorari denied, 383 U.S. 912; *McNeil* v. *Seaton,* 281 F. 2d 931, 936 (C.A.D.C.).

Had these rules remained in effect, certain hearings which have not yet been held in this case would have been required before California could be authorized to build the access road. However, on April 21, 1969, the Secretary of the Interior revoked the new procedures. This was done, again, without compliance with the ordinary procedural requirements of the Administra-

tive Procedure Act. Petitioner contends (Br. 74–78) that while the adoption of the rule in this mode was effective, its revocation was not. It proposes no basis for that distinction. We believe the contention answers itself.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
WALTER KIECHEL, JR.,
Deputy Assistant Attorney General.
WM. TERRY BRAY,
Assistant to the Solicitor General.
EDMUND B. CLARK,
JACQUES B. GELIN,
Attorneys.

AUGUST 1971.

APPENDIX A

UNITED STATES DEPARTMENT OF THE INTERIOR
NATIONAL PARK SERVICE

(Permit No. 4:102–067; expires _____; previous permit No. none.)

Special Use Permit

Sequoia National Park

Director, Department of Public Works, of State of California is hereby authorized during the period from _____, 19__, to _____, 19__, to use the following-described land in the above-named area:

A strip of land sufficiently wide for construction of a two-lane highway not exceeding an average of 200 feet in width, approximately 9.2 miles long, in township 17 South, Range 30 East, Mount Diablo base line and meridian; through Sections 18, 19, 20, 17, 21, 16, 15, 14, 11 and 12 progressing from west to east and containing 220 acres more or less; See Attachment "B"; for the purpose of construction and maintenance of a two-lane limited access highway to Mineral King; subject to the conditions on the reverse hereof and attached pages and to the payment to the Government of the United States of the sum of "waived" dollars ($____), in advance _____ (Monthly, semi-annually, etc.), or as follows: payment to be made to the Superintendent by Express or Postal Money Order, Certified Check, or Draft payable to the National Park Service, or Cash.

Issued at _____ this ____ day of _____, 19__.

The undersigned hereby accepts this permit subject to the terms, covenants, obligations, and reservations, expressed or implied, therein.

TWO WITNESSES TO SIGNATURES	PERMITTEE[1] (Signature)
NAME:	NAME:
ADDRESS:	ADDRESS:
NAME:	NAME:
ADDRESS:	ADDRESS:

APPROVED: (*If approval is required by higher authority*)

NAME:	TITLE: Regional Director.	DATE: _____, 1969

[1] Sign name or names as written in body of permit; for copartnership, permittees should sign as "members of firm"; for corporation, the officer authorized to execute contracts, etc., should sign, with title, the sufficiency of such signature being attested by the Secretary, with corporate seal, in lieu of witnesses.

Conditions of This Permit

1. *Regulations.*—The permittee shall exercise this privilege subject to the supervision of the Superintendent, and shall comply with the regulations of the Secretary of the Interior, or other authorized officer of the Government, governing the area.

2. *Definition.*—The term "Director, National Park Service" as used herein shall include the appropriate Regional Director or Superintendent as the representative of the Director.

3. *Rights of the Director.*—Use by the permittee of the land covered hereby is subject to the right of the Director, National Park Service, to establish trails, roads, and other improvements and betterments over, upon, or through said permises, and further to the use by travelers and others of such roads and trails as well as of those already existing. If it is necessary to exercise such right, every effort will be made by the National Park Service to refrain from unduly interfer-

ing or preventing use of the land by the permittee for the purpose intended under this permit.

4. *Nondiscrimination.*—See attachment A.

5. *Damages.*—The permittee shall pay the United States for any damage resulting from this use which would not reasonably be inherent in the use which the permittee is authorized to make of the land described in this permit.

6. *Construction.*—No building or other structure shall be erected under this permit except upon prior approval of plans and specifications by the Director, National Park Service, and the premises and all appurtenances thereto shall be kept in a safe, sanitary, and sightly condition.

7. *Removal of structures and improvements.*—Upon the expiration of this permit by limitation of time or its termination for any reason prior to its expiration date, the permittee, if all charges due the Government hereunder have been paid, shall remove within such reasonable period as is determined by the Superintendent, but not to exceed 90 days unless otherwise stipulated in this permit, all structures and improvements placed on the premises by him, and shall restore the site to its former condition under the direction of the Superintendent. If the permittee fails to remove all such structures and improvements within the aforesaid period, they shall become the property of the United States, but that will not relieve the permittee of liability for the cost of their removal and the restoration of the site.

8. *Water rights.*—The United States reserves the rights to perfect title to all rights for water which may be developed or used in connection with this permit and shall furnish water to the permittee, when available, at reasonable rates to be approved by the Director, National Park Service. Should such water

service be unavailable or inadequate, the permittee may, with prior approval of the Director, provide the same at his own expense, subject to such special requirements as may be prescribed.

9. *Disposal of refuse.*—The permittee shall dispose of brush and other refuse as required by the Superintendent.

10. *Timber cutting.*—No timber may be cut or destroyed without first obtaining a permit therefor from the Director, National Park Service.

11. *Fire prevention and suppression.*—The permittee and his employees shall take all reasonable precautions to prevent forest, brush, grass, and structural fires and also shall assist the Superintendent in extinguishing such fires in the vicinity of any tract which may be used hereunder.

12. *Soil erosion.*—The permittee shall take adequate measures, as directed and approved by the Superintendent to restrict and prevent soil erosion on the lands covered hereby and shall so utilize such lands as not to contribute to erosion on adjoining lands.

13. *Benefit.*—Neither Members of, nor Delegates to Congress, or Resident Commissioners shall be admitted to any share or part of this permit or derive, either directly or indirectly, any pecuniary benefit to arise therefrom: *Provided however,* That nothing herein contained shall be construed to extend to any incorporated company, if the permit be for the benefit of such corporation.

14. *Assignment.*—This permit may not be transferred or assigned without the consent of the Director, National Park Service, in writing.

15. *Revocation.*—This permit may be terminated upon breach of any of the conditions herein or at the discretion of the Director, National Park Service.

16. The maximum design speed will be 50 miles per

hour. The minimum curve radius and maximum superelevation to conform with Table III–6, page 133 of the American Association of State Highway's Officials' *A Policy on Geometric Design of Rural Highway,* published in 1954, reprinted in 1961; and the maximum grades of 8 percent are authorized with the understanding these criteria are not inflexible. Lesser design speed is authorized where necessary to protect environmental features. Design and construction must afford this protection.

17. The roadway section shall consist of a 24-foot driving surface, 6-foot paved shoulders, and 6-foot paved ditches in cut sections. Shoulders and paved ditch sections shall be chipped for color and texture.

18. The use of bridges for crossing major drainages and at other locations where ecological considerations are of prime importance shall be exploited to the fullest extent. The use of walls, cribbing, half-viaducts, tunnels, and other structural elements shall be given full consideration in order to reduce the height of cuts and fills and shall be used wherever feasible.

19. Climbing passing lanes will be permitted but will be carefully located to reduce scarring.

20. Vistas, overlooks, or roadside parking areas shall be located and constructed as mutually agreed by the State and the Service. Development and operation of water supplies shall be by the State.

21. Fencing of the highway will not be required within the park boundary except as may be specified by the Service after review of final highway plans.

22. Review of Plans and Specifications:

a. The Service will be provided an opportunity to work closely with the State during the preparation of both the preliminary and final plans and specifications. A Service representative will be assigned to the

Mineral King project to coordinate design and construction phases of the project with the State.

b. The final plans and specifications will be presented to the Service for approval and the contract shall not be awarded until such approval is given. Changes in the plans and specifications will be approved by the Service before being placed in effect, provided, however, that the Service may exempt from its approval any changes of a class or type as to which it deems its approval to be unnecessary. The Service shall notify the State of its concurrence or nonconcurrence with any such changed proposals within five calendar days after the State has presented the proposed changes to Service's project representative, or such change shall be deemed to be concurred in by the Service.

23. State shall:

a. Protect and preserve soil and vegetative cover and scenic and esthetic values on park lands outside of construction limits. Construction limits will be that area from top of cut slope to toe of fill slope plus 5 feet on either side, or additional width as required for structures, drainage ditches, or other appurtenances as shown on the approved plans.

b. Provide for the prevention and control of soil erosion on lands adjacent to the roadway that might be affected by the construction, operation, or maintenance of the highway. Vegetate and keep vegetated with mutually approved species all earth cut or fill slopes feasible for revegetation and other areas on which ground cover is destroyed. The State shall also maintain all terraces, water-bars, leadoff ditches, or other preventive works that may be required to accomplish this objective. The provision shall also apply

to slopes that are reshaped following slides which occur during or after construction.

24. Before clearing operations or construction of the highway is started the State will:

a. Prepare, in cooperation with the Service, a fire protection plan which will set forth in detail the fire prevention, presuppression, and suppression measures which will be taken by the State, its employees, contractors, and subcontractors, and their employees in all operations during the construction stage. The fire plan shall be made available to all bidders prior to letting contract and the State shall cause its contractors to comply with all provisions of the fire plan and all burning permits issued for disposal of flammable materials.

b. Prepare, in cooperation with the Service a clearing plan which will set forth in detail the procedures and standards which will apply to (1) all clearing and disposal of merchantable timber, stumps, and young growth in the construction limits and (2) debris disposal, including debris removal from all streams. Such plan shall include provision for payment to the United States by the State or its contractors for all merchantable timber cut, used, or destroyed in the construction of the highway on lands of the United States. Payment for merchantable timber will be at appraised value as determined by the Service: Provided, that the Service may dispose of the merchantable timber to other than the State or its contractors at no stumpage cost to the State or its contractors.

25. The State shall erect appropriate signs acceptable to the Service at each end of the highway project notifying prospective users of the road of construction activities planned or underway. The State shall provide such other signs as the Service deems necessary

for permanent traffic control, for the safety and protection of visitors and wildlife, and for directional and interpretive purposes. Advertising signs shall not be permitted along the roadway.

The work incident to the construction of the Mineral King highway and all work incident to maintenance of the highway prism within the construction limits shall be done by the State without cost to the Service.

26. All road surveys, construction and maintenance activities are to be carried out by the State in such manner as to prevent damage to Sequoia trees and in accord with the findings and recommendations of the detailed study and report, Contract No. 6177–H, made by Dr. Richard J. Hartesveldt with the California Division of Highways (December 19, 1966).

27. Use of Chemicals:

a. The use of chemicals for control of growth of vegetation will be permitted only after specific written approval has been given by the Service. Application for such approval shall be in writing and shall specify the time, method, chemical, and the exact areas to be chemically treated.

b. The use of chemicals for ice control will be permitted only after specific written approval has been given by the Service on a seasonal basis. Application for such approval shall be in writing and shall specify the method and chemical to be used.

28. Waste materials resulting from slides during and after construction as well as surplus materials shall be disposed of at locations approved by the Service. A plan showing the method and location of disposal shall be submitted at the time contract plans are submitted for approval.

29. Mechanized equipment shall remain within the construction limits at all times during construction.

No construction camps will be permitted within Sequoia National Park. Where additional work areas or construction access roads are required within the park, such as at bridge sites, specific areas shall be delineated and approved by the Service. No maintenance buildings or other structures, storage yards, permanent stockpile locations, or borrow pits shall be located within Sequoia National Park.

30. Since the Mineral King Highway is to be a limited access route, the State, during the process of acquiring private lands for the road, will acquire limited access rights thereto within the boundaries of Sequoia National Park.

31. The State agrees that any utilities authorized by or pursuant to law for development and use of the Mineral King Highway and Basin may be placed underground and within the road prism.

32. Subsequent to completion of construction provided for in this permit, or at such time as mutually agreed by the National Park Service and the State, sections or all of the existing road will be abandoned and obliterated. It is the intent that such treatment be limited to scarifying and/or earth blanketing the existing roadway, removal of drainage structures, and berms, opening drainage channels, seeding and other miscellaneous work of this magnitude. It is not the intent to remove existing embankments and place them in existing cuts or to perform other work of this magnitude. It is recognized that additional measures may have to be taken where the existing road is in close proximity of the new road. The State Highway Department will initiate action to transfer the abandoned roadway to the United States.

33. The Service shall not be responsible for any injury to persons or damage to property resulting from

the use and occupancy of federally owned lands by the State, its representatives, employees, or contractors. The State shall save and hold the United States harmless from all claims which might result from any work connected with such occupancy and use, and from any claims which may result from visitor use of the highway and any other areas assigned under this agreement.

34. The State agrees to comply with all standards set forth by the Service, the Federal Water Pollution Control Administration, and other responsible Federal and State agencies for the control and elimination of air and water pollution.

35. The State shall provide suitable access and connections to existing roads within the Sequoia National Park only at locations mutually agreed upon.

36. The enforcement of traffic regulations, investigation of accidents and complaints, rendering assistance to motorists, and other traffic control measures shall be the responsibility of the appropriate agency of the State. Since Sequoia National Park is subject to the legislative jurisdiction of the United States, the exercise of such authority on that section of the road within the park may require special arrangements or legislation.

37. As a condition for granting this permit, Permittee agrees that should it ever be necessary in the future to provide for increased visitor capacity in Mineral King, an alternate means of access to Mineral King shall be provided which does not involve access through the Park; or in the alternative, such excess capacity shall be accommodated through mechanical means in lieu of any further improvement of road access.

ATTACHMENT A

CONTINUATION OF CONDITIONS OF THIS PERMIT (FORM 10–114)

The following provisions constitute Condition 4 in accordance with Executive Order No. 11246 of September 24, 1965, as amended by Executive Order No. 11375 of October 13, 1967.

Nondiscrimination.—If use of the resource covered by the permit will involve the employment by the permittee of a person or persons, the permittee agrees as follows:

(1) The Permittee will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Permittee will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or temination; rates of pay or other forms of compensation; and selection for training, including appenticeship. The Permittee agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Superintendent setting forth the provisions of this nondiscrimination clause.

(2) The Permittee will, in all solicitations or advertisements for employees placed by or on behalf of the Permittee, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The Permittee will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or under-

standing, a notice, to be provided by the Superintendent, advising the labor union or workers' representative of the Permittee's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, as amended, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The Permittee will comply with all provisions of Executive Order No. 11246 of September 24, 1965, as amended, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The Permittee will furnish all information and reports required by Executive Oder No. 11246 of September 24, 1965, as amended, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the Superintendent and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the Permittee's noncompliance with the nondiscrimination clauses of this permit or with any of such rules, regulations, or orders, this permit may be cancelled, terminated or suspended in whole or in part and the Permittee may be declared ineligible for further Government contracts or permits in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, as amended, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, as amended, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The Permittee will include the provisions of Paragraphs (1) through (7) in every subcontract of purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, as amended, so that such provisions will be binding upon each subcontract or purchase order as the Superintendent may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the Permittee becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the Superintendent, the Permittee may request the United States to enter into such litigation to protect the interests of the United States.

Permit No. _____
Permittee _____
Area _____

Revised 5–21–68.

APPENDIX B

U.S. Forest Service

Tabulation of term-revocable permits, May 5, 1969

Area name or permittee	Permit acreage		
	Term	Revocable	Total
Arapahoe Basin	80	1,220	1,300
Aspen	80	89	169
Aspen Highlands	80	479	559
Breckenridge	80	1,684	1,764
Buttermilk	80	454	534
Copper Hill	30	890	920
Crested Butte	50	1,670	1,720
Geneva Basin	35	365	400
Lake Eldora	20	460	480
Loveland Valley and Loveland Basin	80	2,280	2,360
Monarch	16	1,609	1,625
Mt. Werner	80	240	320
Pikes Peak	5	250	255
Powderhorn	25	475	500
Purgatory	20	1,480	1,500
Snowmass	80	6,218	6,298
Sunlight	80	2,001	2,081
Vail	80	6,390	6,470
Winter Park	80	952	1,032
Wolf Creek	80	382	462
Stewart Slope	40	40	80
Antelope Butte	80	87	167
Meadowlark	75	76	151
Sleeping Giant	15	65	80
Carson—Taos Ski Valley	4.8	40	44.8
Coconino—Arnal Corporation	20	757	777
Santa Fe—Lake Peak Corporation, Santa Fe Ski Basin	80	505	585
Fred's Mountain	[1] 80	600	
Alta-Snowbird	55.62	1,116	1,171.62
Bogus Basin	72	788	860
Beaver Mountain	8.4	391.6	400.0
Snow Basin	46.76	701	747.76
Skyline	16	388	404
Brian Head	20	13.72	33.72
Brundage Mountain	34.7	945	979.7
Magic Mountain	6.4	60	66.4
Snow King Mountain Teton Pass	18.25	6,710	6,728.25
Jackson Hole	56.2	585	641.2
Heavenly Valley	40	2,000	2,040
Lee Canyon	40	432.56	472.56
Heavenly Valley	80	1,543.77	1,623.77
Sierra Ski Ranch	80	694.00	777.00
June Lake Development Co	66	1,540.00	1,606.00
Lakeshore Resort	5	?	?
Mammoth Mtn. Ski Area	70.5	1,950.00	2,020.50
Snow Valley, Inc	80	700.00	780.00
Snow Summit Ski Cor	30	590.00	620.00

See footnote at end of table.

Area name or permittee	Permit acreage		
	Term	Revocable	Total
Moonridge Mtn. Estates, Inc.	47.6	658.80	706.40
Weirick and Company	20	750.00	770.00
Dodge Ridge Cor.	8.52	405.58	414.00
Sugar Bowl Cor.	2.5	80.00	82.50
Auburn Ski Club	80	43.00	123.00
Alpine Meadows of Tahoe	80	600.00	680.00
Mt. Reba	80	1,600.00	1,680.00
Pinecrest Lodge	6.31	8.32	14.63
Merced, County of, Organization Camp	5	20.00	25.00
Alpental	29	700	729
Arbuckle Mountain	73	330	403
Crystal Mountain	80	3,700	3,780
Hoodoo Ski Bowl	62	267	329
Hyak	30	290	320
Mission Ridge	80	1,280	1,360
Mt. Ashland	28.6	183	211.6
Mt. Hood Meadows	80	3,100	3,180
Snoqualimie Summit	70	150	220
Spout Springs	69	121	190
Stevens Pass	80	340	420
White Pass	55	160	215
Mt. Pilchuck	80	60	140
J.A.S. Inc. Resort	79.7	32.1	111.8
Haystack Mountain	10	307	317
Sugar Bush Valley	25	600	625
Big M	80	130	210
Lookout Mountain	80	347	427
Wildcat Mountain	26	682	708
Evergreen Valley	80	337	417
Loon Mountain	7	660	667
Waterville Valley	44	738	782
Mount Attitash	20	220	240
Dillon Ski Club	18.3	362	380.3
Grizzly Peak	21.8	658	679.8
Kings Hill	80	507.88	587.88
Missoula Snow Bowl	28.6	521.4	550.0
Bridger Bowl	10.3	1,113	1,123.3
Big Mountain	21.1	1,160	1,181.1
Schweitzer Basin	13.8	146	159.8

[1] Not to exceed.

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MOTION FILED

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IN THE

Supreme Court of the United States

No. 70-34

SIERRA CLUB, a California corporation,
Petitioner,

v.

ROGERS C. B. MORTON, individually and as Secretary of the Interior of the United States, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Motion of the County of Tulare as Amicus Curiae For Leave to Argue Orally

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MOTION

The County of Tulare, a political subdivision of the State of California, respectfully moves this Court pursuant to Rule 44(7) for leave to argue orally as *amicus curiae* in support of the position of Respondents. The County of Tulare has filed an extensive brief as *amicus curiae* in this case. The consent of the Solicitor General has been sought pursuant to Rule 44(7), but he has declined to make any portion of Respondents' time for oral argument available to the County of Tulare. The motion should be granted to assure

that Counsel familiar with all issues which have been briefed will be available to the Court.

ARGUMENT

The proposed Mineral King recreational area which is the subject of this litigation would be located in Tulare County. Tulare County is nearly three times the size of the State of Delaware. The county is the unit of government primarily responsible for planning and land use within its boundaries. Since more than half of the land in the county is federally owned, decisions as to land use on federal land necessarily impinge upon land use decisions in non-federal areas. For that reason, Tulare County has worked for several years with state and federal agencies in planning for public outdoor recreation at Mineral King.

Throughout this litigation the Department of Justice has concentrated more on resolving uncertainty in the law of standing than on resolving the merits of the particular dispute. This was apparent in oral argument before the Ninth Circuit Court of Appeals when virtually all of the government's argument was devoted to the standing issue. The Solicitor General has now suggested that "If this Court agrees with our contention that petitioner has no standing to challenge the Secretaries' action, no further inquiry is required." (Brief for Respondent, p. 36).

It would be a grave injustice to the citizens of the County of Tulare to allow the most important land use issue ever raised within their county to be eclipsed by procedural questions. The Mineral King recreation area will be one of the world's outstanding ski areas. The U. S. Forest Service has planned for recreational use of Mineral King for over twenty years and it is contemplated that $25,000,000.00 of public funds will be spent to provide access to the area and

$35,000,000.00 of private funds will be spent by the permittee, Walt Disney Productions, to build the recreational facilities. Obviously, anticipation of such a recreation area has influenced land use planning in the County of Tulare over the past several years and will continue to do so in the future. But the project has been stalled for the past two years by litigation in which the Sierra Club raises issues going to the authority of the Secretaries of the Interior and Agriculture to permit outdoor recreation on the public lands. If this case is disposed of solely on the grounds that the Sierra Club is not an appropriate plaintiff, the case may be recast with another plaintiff in the future. The State of California and Disney might well decide it would be imprudent to spend $60,000,000.00 on the Mineral King project without a clear and final resolution of this dispute on its merits.

Similarly, the Department of Agriculture, faced with dozens of existing ski areas operating on permits which the Sierra Club asserts are invalid, and planning for future recreational developments, must know whether the permit it proposes to issue to Disney is valid under existing law. *Hearings on H. R. 9417 Before a Subcommittee of the Senate Committee on Appropriations,* 92d Cong., 1st Sess. 2922 (1971).

The County disagrees with the position of the Solicitor General that if the Sierra Club lacks standing this case is moot and the Court should not proceed to the merits. There is a strong public interest in the resolution of the issues in this case on their merits at this time. Where substantial public interests are involved and there exists an unresolved dispute which is likely to continue between essentially the same parties, this Court has traditionally considered and

ruled on the merits of cases which technically may have become moot, *Motor Coach Employees v. Missouri,* 374 U.S. 74 (1963); *Southern Pacific Co. v. Interstate Commerce Comm.,* 219 U.S. 433 (1911); *Southern Pacific Terminal Co. v. Interstate Commerce Comm.,* 219 U.S. 498 (1911); *United States v. Trans-Missouri Freight Association,* 166 U.S. 290 (1897); Note, *Cases Moot on Appeal,* 103 U. Pa.L.Rev. 772 (1955), or in which the particular plaintiff may arguably have lost standing to raise the issue. *Moore v. Oglivie,* 394 U.S. 814 (1969); *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175 (1968). Accordingly, it is important that the County of Tulare, which has carefully briefed all of the issues in the case both in the Ninth Circuit and in this Court, be permitted to argue orally so that the merits might be fully presented to the Court.

For the foregoing reasons the County of Tulare respectfully requests this Court to grant its motion for leave to argue orally.

Respectfully submitted,

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Calvin E. Baldwin
Attorneys for County of Tulare

September, 1971

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 70-34

SIERRA CLUB, a California corporation, *Petitioner*

vs.

ROGERS C. B. MORTON, Secretary of the Interior, et al., *Respondents*

On Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

ARGUMENT

I. PRELIMINARY ISSUES

A. The Sierra Club's Standing is Fully Justified by the Threatened Injuries to its Interest in Mineral King and Sequoia National Park

Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 154 (1970) said that injury to aesthetic, conservational, and recreational values may be advanced by an appropriate litigant as a basis for standing. In opposing the Sierra Club's standing in this case, the Government necessarily challenges that decision.

The Sierra Club exists to preserve aesthetic and conservational values in the United States, and particularly in the Sierra Nevada Mountains. The Club asks this Court to preserve the aesthetic and conservational purposes of statutes several of which were enacted at its urging.[1] The Club's stake in the outcome of this case is underlined by each of the following facts:

[1]See generally Wilderness Society Brief 85.

a. It is a long-time, national, conservation organization committed to protecting scenic and recreational resources. *Citizens Committee for the Hudson Valley v. Volpe,* 425 F.2d 97, 103 (2d Cir. 1970), *cert. den.* 400 U.S. 949 (1970).

b. The Sierra Club was founded to conserve the natural resources of the Sierra Nevada Mountains. It has a special interest in, and a long history of involvement, with efforts to conserve those resources. (See books, articles and legislative history, Petitioner's Opening Brief 30, n.3)

c. The Disney project at Mineral King and the freeway and power transmission line across Sequoia National Park would injure the aesthetic and conservational interest of the Sierra Club and of every concerned member of the class which it represents. (A. 25-46)

d. The Club for several years sought to dissuade the Secretaries from approving the Mineral King project and urged them to conduct hearings on the issues. (A. 26)

e. While not emphasized in the record, there is no dispute that the Club represents the interest of its members who actually physically use and enjoy Mineral King and Sequoia National Park in their present state.[2]

The Government denies that the Sierra Club has standing because its interests are not concrete and because standing is not available in the absence of a special "statutory aid" where the injured class is broad. It is wrong on both counts.

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[2]That use and enjoyment is graphically detailed in a letter dated August 7, 1965 from Sierra Club staff member Michael McCloskey to Forest Service Chief Edward Cliff, in which Mr. McCloskey sought hearings. He quoted from the account of a visit to Mineral King by Mr. Frederich Eissler, who, at the time, was a member of the Board of Directors of the Sierra Club. (A. 41, 42)

The Government does not deny the history of the Sierra Club involvement with Mineral King and the surrounding Sequoia National Park extending from 1899[3] down to and including its recent requests for administrative hearings on the issues involved in this case. When the Solicitor denies that the Club's stake in the outcome is concrete, he is arguing in substance that injury to aesthetic or conservational values *never* can produce the concrete adverseness necessary to assure a case or controversy.

Injuries to aesthetic and conservational values are not as easily measured as economic injury. But difficulty in measuring injury does not lessen the concrete adverseness of the injured party, which is the essence of a case or controversy.

Whatever challenge a court may face in evaluating the stake of other litigants who may seek to protect aesthetic or conservational values, the threat of injury to those values held by the Sierra Club in this case is beyond argument.

The Sierra Club is within the zone of interests protected by the conservation statutes[4] here in issue. The Solicitor admits as much, but argues that those statutes protect everyone and thus confer standing on no one. The Solicitor argues that when the harm is broadly felt, as are injuries to aesthetic and conservational values, the injury cannot be "distinctive or discriminating". Therefore, the argument goes, judicial review is not available. In substance, the Solicitor argues that only economic harm can furnish an adequate basis for standing, unless Congress has expressly afforded judicial review to aggrieved parties.

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[3] *Sierra Club Bulletin*, Vol. III, No. 2 at 170 (1900).

[4] 16 U.S.C. §§ 1, 45c, 497, 688. The conservation purposes of these statutes are discussed *infra* and in the Sierra Club's opening brief.

This Court already decided to the contrary in *Data Processing*[5] when it confirmed that parties "aggrieved" by administrative violation of a statute concerned with aesthetic, conservational or recreational values have standing under the Administrative Procedure Act.[6] While statutes concerned with those values are for the benefit of the entire public, injury is experienced by only those to whom they are important. The Ninth Circuit referred to the Sierra Club as the "rugged few".[7]

But even though others may have been threatened with injury, that does not bar the Sierra Club's standing. *Cf. Baker v. Carr,* 369 U.S. 186 (1962) in which this Court found that the complaining voters had standing to assert " 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' . . ." and were not merely claiming ". . . 'the right, possessed by every citizen, to require that the Government be administered according to law. . . .' " just because the interest was one held by many other voters.[8]

According to the Solicitor, judicial review is not available when the federal administrator's duty runs to the nation as a whole. This argument, the result of which would be to insulate the most important and far-reaching subjects from review, is unsupportable.

The fact that the defendant administrators have been "entrusted" with conserving Mineral King and Sequoia National Park does not preclude a dedicated conservationist organization from assisting in that task. *Cf. UAW v. Scofield,* 382 U.S. 205 (1965); *United Church of Christ v. FCC,* 359 F.2d 994, 1003 (D.C. Cir. 1966).

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[5]397 U.S. at 154.
[6]5 U.S.C. §702.
[7]A. 234.
[8]369 U.S. at 208.

The Solicitor dismisses *Scenic-Hudson Preservation Conf. v. Federal Power Commission,* 354 F.2d 608 (2d Cir. 1965), *cert. den.* 384 U.S. 941 (1966), and *United Church of Christ v. FCC, supra,* as examples of standing granted by special statute. He misunderstands the significance of those cases and this Court's citation of them in the *Data Processing* case, 397 U.S. at 154.

The special statutes involved in those cases only confirmed that Congress intended to provide judicial review. The standing of the organizational plaintiffs in each case was based on the finding that their non-economic injury gave rise to a case or controversy.

In *Scenic Hudson, supra,* the stake of a group of conservationist organizations was confirmed in the fact that ". . . by their activities and conduct [they had] exhibited a special interest in [the aesthetic, conservational, and recreational aspects of power development]."[9]

In *United Church of Christ, supra,* then Judge Burger rejected the notion ". . . that members of the listening public do not suffer any injury peculiar to them . . ."[10] and granted their organizational representative standing in television station licensing proceedings before the Federal Communications Commission on the ground that:

> ". . . Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience. . . . "[11]

The Solicitor completely ignores *Citizens Committee for the Hudson Valley v. Volpe, supra,* 425 F.2d 97. In that

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[9]354 F.2d at 616.
[10]359 F.2d at 1000.
[11]359 F.2d at 1002.

case, the Sierra Club had standing in the absence of any "statutory aid" (other than the Administrative Procedure Act, which applies equally to the case at hand).

Under the decisions of this Court, a litigant need not, and therefore should not, resort to artifice by alleging injury to an inconsequential but unique material interest when injury to the litigant's aesthetic, conservational or recreational interest is the real reason for the lawsuit.

This case illustrates the point. As noted by *amici* Wilderness Society, *et al.*,[12] the Sierra Club sponsors pack trips originating at Mineral King. The Solicitor urges that the threat of injury to this inconsequential enterprise should have been advanced to establish the Club's standing and that its failure to do so somehow suggests that it cares more about a general principle than about Mineral King. The Solicitor cannot seriously believe this.

This activity is of such little importance to the Club that it would not incur all of the disadvantages of litigation in an attempt to protect it. The adversity between the parties arises not over a possible interference with the Sierra Club's pack trips, but over the injury to its concrete aesthetic and conservational interest in Mineral King and Sequoia National Park threatened by the entire plan.

The Government seeks to create a "heads I win, tails you lose" situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to a competing public interest. Counsel have shaped their case to avoid this trap.

Our remaining aesthetic and conservational values are in danger of being lost unless the only likely challengers

[12] Wilderness Society Brief 62, n. 25.

—the conservationists—may obtain judicial review to compel the administrators to stay within the bounds of their statutory authority over special public lands.

B. The Preliminary Injunction Served the Public Interest

The Solicitor concedes that irreversible changes would have occurred at Mineral King and in Sequoia National Park if the defendant secretaries had not been enjoined.[13] His argument that this irreparable injury was not suffered by the Sierra Club falls with the grant of standing.

His argument that *Yakus v. United States,* 321 U.S. 414 (1943) applies to defeat the injunction is in error. Application of *Yakus* would require proof that delay would cause irreparable harm to a significant national interest, which in that case was the implementation of wartime emergency price regulations affecting the entire country. There is no parallel here. Delay does not cause irreparable harm to parties supporting the project,[14] and the project does not involve a national interest. In fact, the interest of the Sierra Club which was protected by the preliminary injunction is aligned with the public interest. *West Virginia Highlands Conserv. v. Island Creek Coal Co.,* 441 F.2d 232, 236 (4th Cir. 1971).

II. MERITS

A. Introduction

Unless this Court decides the important legal issues present in this case, Sierra Club standing will be meaningless because of the manner in which the Ninth Circuit dealt with those issues.

The Sierra Club argues that Congress expressed itself very clearly concerning the extent of developments in

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[13]Respondents' Brief 34.

[14]Petitioner's Opening Brief 36, 37.

national forests, the Game Refuge at Mineral King and Sequoia National Park.[15] But, in 1969, Congress reconfirmed its conservation purposes with the National Environmental Policy Act ("NEPA").[16]

Congress required that, "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [the act]. . . ."[17] These include ". . . a national policy . . . to promote efforts which will prevent or eliminate damage to the environment and . . . to enrich the understanding of the . . . natural resources important to the Nation . . . ."[18]

Any doubts concerning the extent of the Secretaries' power to permit the degradation of natural resources now must be resolved so as to limit that power.

This Court is not hampered by the fact that NEPA was not in existence when the secretaries decided to act. ". . . [T]he correctness of [the decisions] must be determined by the applicable standards of today." *Zabel v. Tabb,* 430 F. 2d 199, 213 (5th Cir. 1970), *cert. den.* 401 U.S. 916 (1971); *cf. United States v. Schooner Peggy,* 1 Cranch 103, 110 (1801).

B. Congress Barred Developments of More Than 80 Acres When it Amended 16 U.S.C. §497

When Congress finally amended 16 U.S.C. §497 in 1956 to increase the maximum size of term developments in national forests from 5 to 80 acres, it was giving in to 25 years of accumulated pressure.

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[15]38 Stat. 1101, 16 U.S.C. §497 (original) (1915); 16 U.S.C. §1 (1916); 16 U.S.C. §§45b, 45c, 688 (1926); 70 Stat. 708, 16 U.S.C. §497 (as amended) (1956).

[16]42 U.S.C. §§4321 *et seq.*

[17]42 U.S.C. §4332.

[18]42 U.S.C. 4321.

The Solicitor contends that the amendment ratified Agriculture's prior practice of issuing supplemental permits for excess acreage. He also argues that Section 497, as amended, is concerned only with providing certainty of tenure and does not limit the size of Disney's use.

This explanation of the legislation is incomplete and misleading; it considers only the goals of the proponents of the legislation and disregards the reason for including any acreage limitation, which was Congress' concern over the adverse effects of large developments on national forest land.

When Congress finally agreed to larger developments, it did not simply strike the five-acre limit as it would have if certainty of tenure had been the only consideration.[19] Rather, it limited term recreational uses to 80 acres and for the first time stated that incidental "facilities" were to be included within the acreage limit.[20]

In setting that limitation, it did not perform an idle act. Hearings on earlier proposals to increase the acreage limit show Congress' concern about size. Congressman Polk in 1933 hearings stated:

> "[I]t seems to me that 80 acres is a rather large tract and that 30 years is a rather long period of time, and that it might be a means whereby commercial interests might get control of a large part of the public domain."[21]

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[19]One year prior to the enactment of Section 497, the Forest Service sought just such a statute. H.R. 13679, 63d Cong., 2d Sess. (1914); see 51 Cong. Rec. 4771, 9101 (1914).

[20]Compare 38 Stat. 1101 (1915) with 70 Stat. 708 (1956); (16 U.S.C. §497).

[21]Hearings on S. 773 Before a Subcommittee of the House Committee on Agriculture, 72d Cong., 2d Sess., Ser. P at 4 (1933).

This led to colloquy, reproduced below,[22] which further reveals the worry of Congress.

The 80 acre limit was the clearest expression possible of Congress' intention to limit developments.

Outside Section 497, there is no authority for the Secretary of Agriculture to permit private use of national forest land unless the use can be revoked at will.[23] Nothing in 16 U.S.C. §551 constitutes a separate grant of authority. *United States v. Grimaud,* 220 U.S. 506 (1911).[24]

In his campaign for relief from the five acre limit, the Secretary of Agriculture did reveal that he had been employing the revocable permit device for excess acreage.

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[22]"MR. MARTIN. It is not only a question of homes, but a question of larger uses, or uses requiring larger tracts. For instance, if they provide skiing grounds, they want to have control over them, and, of course, you could not get much skiing ground on 5 acres.

"MR. ADKINS. You would not provide that anybody should control that much land for skiing?

"MR. MARTIN. They must develop the land for that purpose, of course, and clear it out. You have no idea of the extent to which winter sports have gone up in that section. . . .

"MR. ADKINS. The point is this, if this land is found to be valuable for private purposes, it has no business being a part of the public domain. They should be able to take it over under some form of organization, and develop it. If it is not fitted for that purpose, and if it is to be left in public use, I do not think that tracts of 80 acres should be leased for that period of time." *Id.* at 4, 5.

"MR. ADKINS. . . . Our national forests are better in their natural state for the good of the people, and I do not think we ought to create artificial commercial means to make money to destroy that natural beauty. If you do that, the beauties of nature will soon be gone and you will have an artificial proposition altogether." *Id.* at 20.

[23]See 34 Op. Atty. Gen. 320 (1924) and opinions cited therein.

[24]This Court concluded its analysis of that Section by stating:

> "The Secretary of Agriculture could not make rules and regulations for any and every purpose. . . . As to those here involved, they all relate to matters clearly indicated and authorized by Congress. The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provisions to protect them from depredations and from harmful uses." 220 U.S. at 522.

His point was not to obtain a ratification of the practice by Congress. On the contrary, he represented that the practice was undesirable and would not continue if he could grant permits for up to 80 acres. This led to the amendment.[25]

A major reason given to Congress for expanding the acreage limit was that winter sports facilities required more than five acres.[26] Agriculture repeatedly urged Congress to expand the five acre limit by representing that ski lifts would be erected within the proposed 80 acre area.[26a]

At Mineral King, the promise has been broken. All of the ski lifts (of which we know there will be 20),[27] along with a variety of other permanent improvements, would be located on lands covered by the surplus permit.

While the Ninth Circuit erroneously assumed that the supplementary permit need not be terminable at will (A. 228), the Solicitor recognizes that it must be. He argues that the supplementary permit *is* revocable at

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[25]In 1931, the justification statement for the amendment read in part:

> "Experience has proved that 5 acres is insufficient to permit of the proper development of the most modern types of outdoor camps, hotels, resorts, sanitoria, etc. which, in addition to the principal structures, usually require the related use of lands for the *various necessary utilities, recreational services, etc.* now regarded as essential to such establishments." (Emphasis added) Sundry Hearings on Certain Bills Before the House Committee on Agriculture, 71st Cong., 3d Sess., Ser. V at 62 (1931).

In 1933, Assistant Forester L. F. Kneipp sought to calm Congress' fears about size by stating:

> "An 80-acre figure, with a 30-year period, seems to have made an adverse impression. *But those are the maximum limits.* They would not be authorized by permit, either in area or in time, unless the circumstances justified the maximum allowance of area or period." (Emphasis added) Hearings on S. 773, *supra,* at 16.

[26]See, e.g. Hearings on S. 773, *supra,* at 3, 4.

[26a]See Petitioner's Opening Brief 49-50.

[27]A. 53a.

will, stating that while it is "closely tied to the proposed term permit", the "Department officials would have the *power* to revoke it at any time."[28]

But revocability at will requires that "the occupancy is subject in theory and in fact to immediate termination at any time at the will of the Government", without remaining damage to government property.[29]

Any attempt at revoking Disney's supplemental permit would be subject to Disney's legal right to appeal[30] and to show that on balance, the entire record did not support the decision.[31] In fact, revocation would be (1) impossible without destroying the entire development, including the $35 million investment and (2) meaningless, since once Mineral King is blasted, bulldozed and otherwise dramatically altered, its natural state could not be restored.

The power of this Court to order that its decisions be applied prospectively only and to avoid threatening existing recreational developments is clear.[32] The only relevance of *Utah Power & Light Company v. United States,* 243 U.S. 389 (1917) and *United States v. Californic,* 332 U.S. 19 (1947), cited at page 49 of the Government's

[28]Respondents' Brief 50.

[29]34 Op. Atty. Gen. 320, 328 (1924); 35 Op. Atty. Gen. 485, 488-489 (1928).

[30]Forest Service Regulations, 36 C.F.R. §211.24.

[31]*In re Sherman C. Smith,* 1 U.S.D.A. Board of Forest Appeals Decisions and Rulings Under the Forest Service Appeals Regulations 433 (1967). Tulare County erroneously denies that the appeal would test the grounds for the termination. In quoting from a Forest Service Regulation to the effect that the standard of review is concerned only with whether the contested decision was "contrary to, or in conflict with, the facts, the law or the regulations of the Secretary of Agriculture", it omits the last five words of the provision. They read: "or is otherwise in error". 36 C.F.R. §211.21. The Regulations require that the contested decision be based on a "preponderance of the evidence" (36 C.F.R. §211.36) and require "a full and complete review of the challenged decision" (36 C.F.R. §211.24(g)).

[32]*Cipriano v. Houma,* 395 U.S. 701, 706 (1969); *Grt. Northern Ry. Co. v. Sunburst Co.,* 287 U.S. 358, 364 (1932).

brief, is that they establish that the Secretary of Agriculture would not be estopped from revoking existing permits on the strength of this Court's decision on Mineral King if he chose to do so.

C. The Disney Use is Illegal Whether Mineral King is Deemed Within the Game Refuge or Within the Park

The Solicitor for the first time now argues that game refuges are comparable with national parks. He then argues that the Disney use would be legal in any national park, would be legal in Sequoia National Park in particular, and is therefore legal in the Game Refuge.

As set forth in the argument concerning the freeway in the Park, the Disney development would be legal neither in parks generally nor specifically in Sequoia National Park.[33]

Even if a Disney-type development could be found somewhere among the millions of acres of national parkland (and it can't), that would not decide its legality at Mineral King. Congress singled out all of Mineral King for unique protection. It directed the Secretary of Agriculture to "protect from trespass the public lands . . . and the game animals" within the Game Refuge.[34] None of the refuges where the Government claims recreational facilities have been authorized[35] are the subject of such specific protective legislation.[36]

Moreover, the few small scale ski developments in national parks[37] offer no precedent for the massive Disney development.

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[33]See discussion *infra* at 15-16.
[34]16 U.S.C. §688.
[35]Respondents' Brief 53, n. 24.
[36]See 16 U.S.C. §§682, 692, 694.
[37]See n. 44 at p. 15.

The Solicitor now attempts to minimize the effect of the Disney development on the Game Refuge at Mineral King by arguing that "only some 3 per cent (approximately 465 acres) of the Valley's total area (15,000 acres) would be even slightly altered."[38]

These figures are new to the case. In the Ninth Circuit, the Government argued that 316 acres would be altered.[39] It has furnished no *evidence* on the subject in any court. In fact, while the Game Refuge with its remote mountainous reaches includes 15,000 acres, the Valley, where most of the huge project and the people would be concentrated, totals only 320 acres.[40]

The District Court found that major facilities would be located outside 80 acres on some 1,000 acres and that the resort "may affect 13,000 acres." (A. 187, 188) The Ninth Circuit did not overrule this finding. (A. 229, 230)

D. Neither the Disney Development nor a Newly Emerged Permit Legalize the Freeway Across the Park

Without any basis in the record, the Solicitor General offers two new props for Interior's decision to authorize the State of California to construct a "freeway"[41] across Sequoia National Park to serve Mineral King.

He claims, first, that the freeway would serve a park purpose because Mineral King is integral with Sequoia National Park and second, that a permit new to the case furnishes evidence of safeguards and park purposes. These are *post hoc* rationalizations which are entitled to no weight. *Investment Co. Institute v. Camp,* 401 U.S. 617,

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[38]Respondents' Brief 53.

[39]Government's Reply Brief to the Ninth Circuit 5, 6.

[40]Computation from Disney's description of Mineral King Valley: "2 miles long and slightly over one-quarter mile wide." *A Proposal for the Development of Mineral King from Walt Disney Productions.*

[41]This is the term employed by the State (A. 57) which also has referred to the highway as "an access-controlled facility" (A. 54).

628 (1971), *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 420 (1971).

A highway designed to serve Mineral King serves no purpose in Sequoia National Park because Mineral King is located outside the Park.

But if Mineral King were integral with the Park, there would be no park purpose for the highway because the Disney development would not exist. The development would be illegal in any national park.[42]

If the Solicitor thinks that ". . . there can be little doubt that the proposed development fully accords with general national park purposes,"[43] the Secretary of the Interior disagrees. His approach to the development of ski areas in national parks is as follows:

> ". . . These efforts have not been directed toward creating large, highly developed areas comparable with commercial ski spots, but rather toward more modest family-type developments where skiing may be enjoyed in an environment of great beauty."[44]

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[42] 16 US.C §20, cited by the Solicitor, does not provide authority for the resort. That section, which with Sections 20a-20g was enacted to assist the financing of necessary projects, states that facilities may be built only as necessary to permit the use and enjoyment of parks. Even then, construction must be "carefully controlled" so as not to impair park values.

[43] Respondents' Brief 54.

[44] *Winter Activities in the National Park Service*, U.S. Government Printing Office: 1970-435-397/33 at 2. The comparative impact of the six recreational facilities referred to on page 54 of the Government's brief and of the Disney facilities at Mineral King can be measured by the nature and amount of the skier lift equipment which is installed. That equipment is as follows: (1) Mount Rainier: 4 rope tows, 1 Poma lift (*Id.* at 14); (2) Sequoia and Kings Canyon National Parks: 3 rope tows (*Id.* at 18); (3) Yosemite National Park: 4 T-bars, 1 chair lift (*Id.* at 21); (4) Olympic National Park: 3 rope tows (*Id.* at 16); (5) Lassen Volcanic National Park: 2 rope tows, 1 Poma lift (*Id.* at 13); (6) Rocky Mountain National Park: 2 T-bars, 2 Poma lifts (*Id.* at 17).

This Court may judicially notice the relatively minor impact on natural values of rope tows, T-bars and Poma lifts on the one hand and the relatively major impact of chair ski lifts and gondolas on the other.

Disney proposes 22 chair ski lifts and gondolas at Mineral King!

Moreover, for Sequoia National Park, Congress in 16 U.S.C. §45b set specific limits on developments:

> "Said Secretary may, in his discretion, execute leases to parcels of ground *not exceeding ten acres* in extent at any one place to any one person or persons or company for *not to exceed twenty years,* when such ground is necessary for the erection of buildings for the accommodation of visitors." (Emphasis added)

The Disney plan would violate both the time and space limitations. Since the proposed Disney development could not be justified inside Sequoia National Park, it furnishes no park purpose for the freeway.

The Solicitor is left with the argument that Interior's alleged obligation to cooperate with Agriculture "in the supervision, management and control of contiguous lands under their respective control"[45] justifies a highway not supportable on any other ground. Neither 16 U.S.C. §2 nor 16 U.S.C. §8c, cited by the Solicitor, identifies such an obligation.

When Congress directed the Secretary of the Interior to manage the national parks so as "to conserve the scenery and natural and historic objects and the wild life therein" and to provide for their enjoyment in such a way "as will leave them unimpaired for future generations" (16 U.S.C. §1), it left him no discretion to authorize physical changes unless his purpose was to provide for the enjoyment of the park and its values. The Secretary's cooperation with other federal officials who manage public lands must occur within the limits of his power. Otherwise such "cooperation" would thwart the will of Congress. The illegal effect on the park values of a freeway

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[45]Respondents' Brief 57.

would be the same whether it provides access to a huge development within the Park or outside it.

The Solicitor also contends that the highway would serve the needs of Sequoia National Park by improving access to it. Any new highway through virgin parkland would improve access to the area remaining on either side after the highway was laid down, in the sense that it would make the remaining area visible to people passing through in automobiles.

The Solicitor's brief now unveils, for the first time in this case, a permit purportedly identifying park purposes for the highway (scenic overlooks, parking, connections with other park roads, etc.).[46] This "Supreme Court permit" was not before the District Court and differs significantly from another permit which the Government first offered in its Ninth Circuit reply brief.

Even if we rewrote history and assumed that the Secretary had in mind these "park purposes" when he approved the highway, he could not have achieved them with the permit in its latest form.[47]

The Solicitor also advances the "Supreme Court permit" as evidence that the "road would not pose any real dangers to the park lands."[47a] Presumably what is meant

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[46]Respondents' Brief 55, 56, n. 27.

[47]Clause 20, cited as authority for the statement that the highway would feature scenic overlooks and roadside parking areas, in fact provides that such facilities "shall be located and constructed as mutually agreed by the State and the Service." Obviously this language does not compel the State, which is paying for the highway, to agree to build the facilities. Clause 35 is cited for the statement that the highway will feature "interchanges and connections with other Park roads." Respondents' Brief 56, n. 27. Clause 35 in fact provides that: "The State shall provide suitable access and connections to existing roads within the Sequoia National Park only at locations mutually agreed upon." Again, this language guarantees nothing to the Secretary. What is even more absurd is that there are no "other Park roads" with which to connect or interchange other than the existing Mineral King Road!

[47a]Respondents' Brief 58.

is that except as to park lands actually used for the highway, its bridges, cuts, fills and supporting structures, there will be no damage. The assurances found in the permit apply only to that portion of the Park which remains after the highway cuts its swath.[48]

Interior is powerless to authorize the State to occupy 220 acres of National Park for a highway use.[49] This lack of authority may not be circumvented by including a revocation provision[50] in the permit for a use that 1) must continue for a term in order to provide access to a term use; 2) is of such a massive and permanent character that restoration of the Park to its natural condition upon termination of the use would be impossible; 3) involves an investment which conservatively is estimated at 25 million dollars. (A. 29)

E. All Transmission Lines in Sequoia National Park Require Congress' Approval

The Solicitor argues that even though 16 U.S.C. §45c reads otherwise, Congress' approval is not needed for a transmission line across Sequoia National Park to serve

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[48]The Government asserts that the freeway would be on the same right-of-way as the old road. See Respondents' Brief 57. The record proves otherwise. (A. 73) In its reply brief in the Ninth Circuit, the Government stated at page 12:

> "Professor Clarkeson of M.I.T., the Department's consultant, tried to follow the old road's contours, but this proved impracticable. The proposed road, therefore, will follow the old cut for only a short distance."

[49]The Government relies primarily on 16 U.S.C. §8, which authorizes the Secretary of the Interior to construct roads in national parks. But the permit in question is not merely a contract with the State of California to build a highway; it transfers to the State long term control over park land. Sections 1 and 2-4, also cited by the Government, are not authority for term road permits or for any use which does not serve a park purpose.

[50]In the "Ninth Circuit permit," the term was twenty years. In the "Supreme Court permit," the dates which define the period of effectiveness are left blank and the fifteenth condition reads: "*Revocation*—This permit may be terminated upon breach of any of the conditions herein or at the discretion of the Director, National Park Service."

Mineral King. He claims that the sole purpose of 16 U.S.C. §45c, enacted in 1926, was to prevent hydroelectric projects within the expanded Park by removing the Park from Federal Power Commission jurisdiction. The argument is that this was the only purpose of identical language in 16 U.S.C. §797a passed in 1921 to protect parks as they existed at that time.

The legislative history of Section 797a proves the contrary. In enacting Section 797a, Congress rejected another bill which simply would have excluded parks from Federal Power Commission authority.[51] The difference between the bills was carefully explained to Congress by the Executive Secretary of the Power Commission, who noted that the bill which became Section 797a was "broader in scope" and would prohibit components listed therein "for whatever purpose used, whether water power, water supply, or irrigation, without the express approval of Congress."[52]

Congress was told that Section 797a would require it to approve *all* transmission lines across national parks.[53] Congress showed its concern in Section 797a, and later in Section 45c, not only with power developments as a whole, but also with the adverse effects of the structures set forth in the statutes.[54] The language of Section 797a and

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[51]H.R. 14760, 66th Cong., 3d Sess. (1921). The Power Commission's licensing authority is contained in 16 U.S.C. §797 subd. (e). See *Pacific Power & Light Co. v. Federal Power Comm.*, 184 F.2d 272, 274 (D.C. Cir. 1950) which notes that FPC jurisdiction is limited to projects and "project works." Sections 797a and 45c do not contain the limiting term "project works."

[52]H. Rep. No. 1299, 66th Cong., 3d Sess., at 3 (1921).

[53]When a congressman suggested that if the power source was outside the park, a transmission line across the park was a "little matter", Secretary of the Interior John B. Payne made it clear that Congressional approval would nevertheless be required. Hearings on H.R. 14469, H.R. 14760 and H.R. 15126 Before the House Select Committee on Water Power, 66th Cong., 3d Sess. at 17 (1921).

[54]In supporting the bill which became Section 797a, Secretary of Agriculture Edwin Meredith stated, "[T]he public should have notice whenever there is a proposal to utilize the parks, or any

Section 45c has not been repeated where projects and their associated components are the sole target.[55]

The Government's argument that the transmission line is legal because it serves the Disney project at Mineral King (which the Government now asserts is integral with the Park) is unavailing. Not only is Mineral King not located in the Sequoia National Park[56] but even if it were, Section 45c does not exempt transmission lines serving a park. The transmission line causes the same damage whether it carries power *to* the park or *from* the park.

CONCLUSION

For the foregoing reasons, and those set forth in Petitioner's Opening Brief, it is respectfully submitted that the judgment of the Ninth Circuit should be reversed.

November, 1971.

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portion of them, for purposes other than those for which they were originally created." Hearings on H.R. 14469, H.R. 14760 and H.R. 15126, *supra*, at 27.

[55]When Congress sought only to insure that hydroelectric projects would not be licensed in new parks, it added the following or similar language in the enabling legislation: ". . . the Federal Power Act shall not apply to or extend over such lands." See 16 U.S.C. §§21b, 47b, 158, 197, 201b, 221b, 342b, 391b-1, 402e, 403b, 404b, 407b, 408b, and 410b.

[56]16 U.S.C., §688; see discussion *supra* at 15.

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IN THE

Supreme Court of the United States

Supreme Court, U.S.
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No. 70-34

SIERRA CLUB,

Petitioner,

v.

ROGERS C. B. MORTON, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE REPLY BRIEF AND REPLY BRIEF FOR THE ENVIRONMENTAL DEFENSE FUND AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE REPLY BRIEF

The Environmental Defense Fund hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case.

The vital interest of the Environmental Defense Fund in the outcome of this case was explained in our principal brief. We then proceeded to argue in that brief that the Ninth Circuit erred in holding that the Sierra Club lacked standing and in holding, on this record, that the Secretary of Interior had acted within the scope of his statutory authority in approving the construction of a new access highway to Mineral King

through Sequoia National Park. The Sierra Club, in its principal brief, urged several additional reasons why the judgment of the Ninth Circuit should be reversed, and the government's brief deals with these additional points as well as the points that we briefed in common with the Sierra Club.

Ordinarily we would not consider it appropriate to burden the Court with a reply brief *amicus curiae*. In present circumstances, however, the extra burden is justified in our view by the chance that an independent reply from the Environmental Defense Fund might materially assist the Court in connection with the access highway issue—the only issue apart from standing that we addressed in our principal brief and the only one with which we deal in the attached reply brief. The need for further statement on this issue arises in part because of the new legal theories introduced by the government in defense of the highway approval action, which alter somewhat the arguments at which our principal brief was directed. More importantly, the government has introduced in this Court certain factual assertions—relating to the special use permit for the access highway that the Department of Interior proposes to grant to the State of California—that are not only new but that differ from the facts on the same subject as they stood when the case was before the Ninth Circuit. Quite simply, the special use permit attached as Appendix A to the government's brief in this Court is not the same as the permit attached to its brief in the Ninth Circuit. Nor does the government's brief in this Court make any mention of revision of the permit. In result, the argument in our own principal brief contains references to permit provisions that do not correspond to any provisions of the permit now before this Court. While we do not believe that any justification for the Secretary's highway approval action can be found in the revised permit—indeed we see in the revision another reason why the Secretary's action should not be sustained—nevertheless we believe that the Environmental Defense Fund is entitled to an opportunity to press these contentions in an independent reply brief.

WHEREFORE, it is requested that leave to file the attached reply brief *amicus curiae* be granted.

Respectfully submitted,

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REPLY BRIEF FOR THE ENVIRONMENTAL DEFENSE FUND AS AMICUS CURIAE

In our principal brief, we addressed ourselves to the issue of the Sierra Club's standing and the issue of the authority of the Secretary of Interior to permit construction of a highway through Sequoia National Park. It seems to us that the weakness of the government's arguments on the highway issue, to which we confine ourselves in this reply brief, demonstrates in a striking way that lawless administrative action, and an unauthorized use of public land, will result unless the standing issue is resolved in the Sierra Club's favor.

THE INADEQUACY OF THE ADMINISTRATIVE RECORD

Nowhere in its brief does the government assert that there exists in this case the essential condition for effective judicial review of agency action that is challenged as arbitrary and in excess of statutory authority—namely, a record consisting of all the materials that were before the Secretary when he made his decision plus whatever additional materials are necessary to disclose what considerations the Secretary deemed relevant, how he appraised the evidence, and how he construed his authority. *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402, 416, 420 (1971). Indeed, apart from certain ambiguous references to a proposed special use permit for construction of the highway, which it attaches to its brief as Appendix A but which apparently is not even part of the administrative record let alone an adequate record by itself, the government does not seek to identify any of the materials that were before the Secretary when he approved a Sequoia National Park routing for an access highway to the Mineral King development. Instead the government would have this Court proceed to judgment in its favor according to its own rules of review—that is, on the basis of imaginative and shifting *post hoc* rationalizations which may or may not have something to do with the basis on which the Secretary actually made his decision. Even if these rules are accepted we have argued that petitioner must still prevail, since not even the most clever reasoning can provide a legitimate park purpose for the access highway. But if we are wrong about that—if this Court concludes that construction of the highway somehow could be justified for the reasons now suggested by the government—at most the cause should be remanded to determine if those are the reasons that actually prompted the Secretary's decision.

THE PARK PURPOSE ISSUE

The government makes no serious effort to justify the access highway to the planned Mineral King development on grounds that it would serve the purposes for which the national parks, including Sequoia, are required by 16 U.S.C. § 1 to be managed. Indeed the only argument whatever to this effect is relegated to a footnote,[1] in which it is represented that the highway would

> ". . . enhance the public's opportunity to enjoy the Park, through improved access to it; it would also include construction of scenic overlooks and roadside parking areas, and involves interchanges and connections with other Park roads (Appendix A, *infra*, Clauses 20, 35)." (Appendix A is the proposed special use permit.)

We have already demonstrated in our opening brief (pp. 61-67) that the Secretary, if he thought at all about enhancing public opportunity to enjoy Sequoia National Park—a thought which he kept to himself so far as the inadequate administrative record in this case discloses—might well have concluded that construction of a high-speed road would be inadvisable and destructive. We will not repeat here our contentions in this regard. However, it seems to us that the government's specific reliance on Clauses 20 and 35 of the special use permit—a document that as we will show in a moment is not entitled to weight in any respect—does require comment.

Clause 20 is cited as authority for the statement that the highway would feature scenic overlooks and roadside parking areas. What Clause 20 provides in fact is that such facilities "shall be located and constructed as mutually agreed by the State and the Service." Obviously this language gives no assurance of actual construction. Clause 35 is cited for the statement that the highway will feature "interchanges and

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[1] Respondent's brief n. 27, at 55-56.

connections with other Park roads." What Clause 35 provides in fact is that:

> "The State shall provide suitable access and connections to existing roads within the Sequoia National Park only at locations mutually agreed upon."

Again, on its face this language hardly carries any guarantee of construction. But what makes the government's reliance on Clause 35 even sillier—absurd would be an appropriate word under the circumstances—is that there are no "other Park roads" to connect or interchange with. At least, with the exception of the existing Mineral King Road to which there is already access from beyond both the west and east park boundaries, the government has not identified and we are not aware of any such "other Park roads."[2]

Given its need to rely on Clauses 20 and 35 of the special use permit, it is not surprising that the government has buried in a footnote its argument that:

> "To a significant extent, the new road would directly serve the needs of the Park itself." (Resp. Br. n. 27, at 55-56.)

At center, what the government does argue in the text of its brief is that, while Sequoia National Park as its boundaries are actually constituted would not be served by the access highway, that park must realistically be viewed as encompassing the Mineral King Valley, with which it allegedly is associated by its topography and by its history, and that viewed in this larger perspective the proposed resort development is simply an improvement of the park and the access highway simply a means of servicing park facilities. In this "non-technical sense," so the government urges, "it is clear that this road serves *only* a Park purpose." (Resp. Br. 56, emphasis as in original). The twin premises on which this argument rests are: first, that the Mineral King Valley lands "were intended by Congress to be integral with the [Sequoia National] Park" (Resp. Br. 56) and that because of this

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[2]See map of area (A. 73).

"essential identity" (Resp. Br. 13) the "Park and Valley were intended by Congress to be administered and devleoped as a closely inter-related unit" (Resp. Br. 15); and second, that ski resorts and the attendent buildings, tows, lifts, and runs are authorized, without acreage limitations (Resp. Br. 54), within the national parks, so that the proposed development may permissibly be constructed and serviced by the access highway if the Valley is considered a part of the park.[3] This

[3]The government also invokes an asserted statutory duty of the Secretary of Interior to cooperate with the Secretary of Agriculture in the management of contiguous lands:

> "The Secretary's proposed authorization of the new road comports fully with his broad responsibilities and with the particular history and development of this area. Of course, the Secretary's primary duties relate to the national parks and other areas under his direct supervision. But Congress, in delegating responsibility over various portions of the public domain to different federal officials, was not unmindful that coordination between these officials is essential. Accordingly, it is expressly provided that the Secretaries of Agriculture and Interior are to cooperate in the supervision, management and control of contiguous lands under their respective control." (Resp. Br. 57)

The citation for this statement, with its reference to express provisions, is: "See 39 Stat. 535, as amended, 16 U. S. C. 2; compare 46 Stat. 1054, 16 U. S. C. 8c." We have seen the first of these provisions and compared it with the second, but we are completely in the dark about the relevance of either. 16 U. S. C. § 2 provides that "the Secretary of Agriculture may cooperate with said National Park Service to such extent as may be requested by the Secretary of Interior" in the supervision of national monuments contiguous to national forests. 16 U. S. C. § 8c provides that the Secretary of Interior shall secure the approval of the Secretary of Agriculture before approach roads to national parks are constructed through national forest lands. Both provisions deal with special situations and are wholly inapplicable to the present case. But even if they did establish some broad statutory requirement of cooperation between the two Secretaries as regards the administration of contiguous park and forest lands, there is absolutely no reason to believe that such a requirement would modify the obligation of the Secretary of Interior to manage the national parks for the fundamental purposes stated in 16 U. S. C. § 1, or that it would justify the surrender of park values to facilitate commercial development on adjoining lands. Moreover, because the record is completely silent as to

theory, the latest in a series of *post hoc* rationalizations of the Secretary's action, is a new arrival in this litigation.[4] Like its predecessors, it is untenable.

In the first place, even if there were validity in the notion that areas beyond park boundaries but forming part of what in the government's view is an "integral land mass" (Resp. Br. 13) may be treated for administrative purposes as incorporated in the park itself—a doctrine that would permit a dramatic expansion of lands under the effective control of the National Park Service—it would have no application so far as Sequoia National Park and the adjoining Mineral King Valley are concerned. That is true because, as the government itself recognizes (Resp. Br. 52), the Congress considered and rejected inclusion of the Valley in the park when it enacted the 1926 legislation enlarging the park. 44 Stat. 818, 16 U. S. C. § 45a. Instead, Congress designated the Valley as part of the Sequoia National Game Preserve within

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what considerations the Secretary of Interior took account of when he approved the Mineral King access highway, we do not know whether he relied on some general mandate to cooperate with the Secretary of Agriculture—a mandate which in any event the government is unable to find even with full opportunity for *post hoc* rationalization of the Secretary's decision—or if so what authority he thought he had under any such mandate

[4] At another point in its brief, the government argues that:

> "Moreover, the use restrictions applicable to forest lands because of their designation as game refuges are no greater than those applicable to national park lands generally, and to Sequoia National Park lands in particular. [Citations omitted.] It follows that any use that would be proper on park lands would be proper in the Valley." (Resp. Br. 53-54.)

It is doubtless true that land uses that would be proper in national parks would often be proper on other adjoining public, or even private lands. But that circumstance is irrelevant unless it somehow supports a conclusion, which not even the government reaches, that connecting highways may be authorized within the parks whenever the adjoining lands to be served are devoted to uses consistent with park uses. However that may be, it makes no difference since as we demonstrate above the proposed development in the Valley would not be an authorized land use in Sequoia National Park.

Sequoia National Forest, 44 Stat. 821, 16 U. S. C. § 688, and expressly provided in this statute that while its status as a game refuge would prevent the hunting or trapping of wildlife, the Valley would otherwise remain subject to all uses permissible in national forest lands:

> ". . . the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and regulations applicable thereto so far as may be consistent with the purposes for which said game refuge is established."

So the simple answer to the government's attempted merger of the Mineral King Valley into Sequoia National Park is that the areas are separate in fact, as evidenced by the boundary line between them, and that Congress expressly intended them to be distinctive as to both use and administration.

Even if the government's arguments could make the boundary line between the park and the Valley disappear, thus magically enabling the proposed development to be viewed as a park facility, it would make no difference since, contrary to the government's assertion (Resp. Br. 15, 54), the development would be an unauthorized land use within the park. That is so because of the limitations placed on the Secretary's authority by 16 U.S.C. § 45b, which relates specifically to Sequoia National Park and thus displaces any inconsistent provisions relating generally to the areas within the national park system:[5]

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[5] Areas within the national park system are governed by the statutory provisions that are specifically applicable to those areas, except that the statutory provisions of general application, such as 16 U. S. C. §§ 1-4, also apply to the extent they are not inconsistent with any specific provisions. 16 U. S. C. § 1c(b). It is very far from being clear that a proposal to locate the Disney project within Sequoia National Park would be admissible under the statutory provisions applicable to the parks generally, even assuming that such a proposal were not barred by 16 U. S. C. § 45b. The general provisions to which the government points are 16 U. S. C. §§ 20 and 20a, pursuant to which it is represented

"Said Secretary may, in his discretion, execute leases to parcels of ground not exceeding ten acres in extent

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that ski resort areas have been developed by private concessionaires in several different national parks (Resp. Br. 54). Section 20 provides in relevant part, referring back to the Act of August 25, 1916, the Organic Act of the National Park Service, 39 Stat. 535, that:

> "In furtherance of the Act of August 25, 1916 (39 Stat. 535), as amended, which directs the Secretary of the Interior to administer national park system areas in accordance with the fundamental purpose of conserving their scenery, wildlife, natural and historic objects, and providing for their enjoyment in a manner that will leave them unimpaired for the enjoyment of future generations, the Congress hereby finds that the preservation of park values requires that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use, so that the heavy visitation will not unduly impair these values and so that development of such facilities can best be limited to locations where the least damage to park values will be caused. It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas." (16 U. S. C. § 20.)

The government apparently reads this statement of policy, and the related directive in Section 20a, as a broad new grant of authority that enabled the Service to throw open the national parks to theretofore unauthorized land uses. In reality, however, Congress intended nothing of the sort, its central purpose in enacting the 1965 legislation of which both these provisions were a part, P.L. 89-249, being to give park concessionaires greater assurance and protection, in the form of possessory interests in improvements and guaranteed compensation in the case of loss of investment, see 16 U.S.C. §§ 20b-20e, in already existing land uses. See S. Rep. No. 765, 89th Cong., 1st Sess. (1965). If anything, the quoted language, since it speaks in terms of "controlled safeguards" for such facilities as "have to be provided," cut back on the Secretary's then existing authority with respect to park development, as set forth in the 1916 Organic Act, 39 Stat. 535, 16 U. S. C. § 3:

> "He may also grant privileges, leases, and permits for the use of land for the accommodation of visitors . . . but for periods not exceeding thirty years."

Unless a ski resort and its attendant facilities can be regarded as a "use of land for the accommodation of visitors"—a usage which has never

> at any one place to any one person or persons or company for not to exceed twenty years, when such ground is necessary for the erection of buildings for the accommodation of visitors."

Since much more than ten acres is to be devoted to the "erection of buildings for the accommodation of visitors" (see Resp. Br. 38-39), and since the permit for such facilities is to be issued for a term of 30 years, it is manifest that the location of the proposed Disney development inside the boundaries of Sequoia National Park would be unauthorized.

THE SPECIAL USE PERMIT

The government lays great stress in its brief on the special use permit that the Service proposes to issue to the State of California for construction and maintenance of the park segment of the access highway to Mineral King. See Resp. Br. 5-6, 15, 55-56, 58-59. Evidently one conclusion the Court is meant to draw from the permit is that, following the approval of a park routing, some account was taken of park values in the design and planning of the highway. If that were the government's only point, we would feel no need to respond since, as we have shown in our principal brief, unauthorized administrative action cannot be justified by efforts to minimize its impact. However, the government now seems to be making an additional point about the per-

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received judicial sanction and which so far as we can determine did not receive legislative consideration, let alone sanction, in connection with P.L. 89-249—the Secretary's authority to permit such developments within the national parks is questionable at best. And see also in this connection *Administrative Policies For Natural Areas Of The National Park System*, Department of Interior, National Park Service, pp. 8, 48 (1970 ed.), in which skiing is not listed among those recreational activities that "can be accommodated without material alteration or disturbance of environmental characteristics or the introduction of undue artificiality into a natural environment," which according to this publication are the only kinds of recreational activities to be encouraged in the natural areas of the national park system, including the national parks themselves.

mit, to which we do feel a need to respond—namely, that the provisions of the permit reflect the considerations that the Secretary deemed relevant and took into account at the time he made his decision to approve the highway. Thus the government argues:

> "Finally, the proposed new road would not pose any real dangers to the park lands. . . . At each step, extraordinary safeguards to provide against destruction of Park values have been, or would be, taken. Professor Hartesveldt's ecological study reported that construction of the proposed road would not damage the Park's sequoias, provided stated precautions were taken; only after receiving this assurance did the Secretary agree to authorize California to build the new road, specifically subject to the Hartesveldt recommendations (Appendix A, *infra*, Clause 26). More generally, the permit requires that '[d]esign and construction must afford . . . protection' for environmental features (Clause 16). And all federal and state standards for controlling and eliminating air and water pollution must be met (Clause 34). The state has agreed that if the new road is not adequate to handle the increased traffic, it will not seek any further improvement of the road through the Park, but instead will provide for such traffic by other means (Clause 37). All phases of the design and construction of the road are subject to departmental supervision and control (Clauses 1, 6, 9, 10, 12, 16, 20, 21, 22, 23, 25, 26, 28, 29, 35). In these circumstances, construction of the new road would pose no significant risk of harm to the Park or park values." (Resp. Br. 58-59)

This argument carries a strong suggestion that the provisions of the permit, as they appear in Appendix A to the government's brief, were already settled and were at least part of the record on the basis of which the Secretary authorized the highway corridor through Sequoia National Park. In fact it is not at all clear that any form of proposed permit was in being when the Secretary acted. See Affidavit of Sequoia National Park Superintendent McLaughlin paras. 4,

6; A. 181-182. Certainly no such document was placed before the District Court. But even if some proposed permit was then in being, it was not in the same form as Appendix A to the government's brief. For that matter, Appendix A is not the same as the proposed permit that the government attached as an appendix to its reply brief in the Ninth Circuit.[6] So, for example, Clause 37 of the permit appearing as Appendix A, on which the government relies in the argument quoted above and in which conditions against further expansion of the access highway are set forth, was not included in the permit presented to the Ninth Circuit.[7]

We are not certain what conclusion to draw from the changing character of the special use permit for the access highway, but quite obviously the document before this Court as Appendix A to the government's brief was not before the Secretary when he made his decision. Even if it had been, as we have seen, it would make no difference since even in its present form the proposed permit does not establish a park purpose for the highway.

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[6]The document attached to the government's reply brief in the Ninth Circuit was the first form of proposed permit to appear in this litigation. That is the document to which we addressed our remarks in our opening brief in this Court (p. 75, n. 73).

[7]We are not entirely certain what other differences there may be in the two forms of permit, because the government omitted a page (apparently containing Clauses 1-14 of the permit as it then stood) from the document that it attached as an appendix to its reply brief in the Ninth Circuit. However, there must have been at least some other changes. Compare, for example, Clause 15 of Appendix A (which deals with revocation of the permit) with Clause 15 of the document appended to the reply brief in the Ninth Circuit (which deals with matters unrelated to revocation, the latter being a subject not touched on anywhere in this document unless by some provision on the omitted page). And compare also the first page of the two forms of permit, the term of the permit being left blank in Appendix A while the dates were inserted in the document appended to the reply brief in the Ninth Circuit (suggesting, so we argued in our opening brief in this Court—p. 75, n. 73—an unwarranted reliance on 16 U.S.C. §45b).

CONCLUSION

For the foregoing reasons, and for the reasons already set forth in our principal brief, the order of the Court of Appeals vacating the preliminary injunction should be reversed.

Respectfully submitted,

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SIERRA CLUB *v.* MORTON, SECRETARY OF THE INTERIOR, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 70–34. Argued November 17, 1971—Decided April 19, 1972

Petitioner, a membership corporation with "a special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country," brought this suit for a declaratory judgment and an injunction restraining federal officials from approving an extensive skiing development in the Mineral King Valley in the Sequoia National Forest. Petitioner relies on § 10 of the Administrative Procedure Act, which accords judicial review to a "person suffering legal wrong because of agency action, or [who is] adversely affected or aggrieved by agency action within the meaning of a relevant statute." On the theory that this was a "public" action involving questions as to the use of natural resources, petitioner did not allege that the challenged development would affect the club or its members in their activities or that they used Mineral King, but maintained that the project would adversely change the area's aesthetics and ecology. The District Court granted a preliminary injunction. The Court of Appeals reversed, holding that the club lacked standing, and had not shown irreparable injury. *Held:* A person has standing to seek judicial review under the Administrative Procedure Act only if he can show that he himself has suffered or will suffer injury, whether economic or otherwise. In this case, where petitioner asserted no individualized harm to itself or its members, it lacked standing to maintain the action. Pp. 4–14.

433 F. 2d 24, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE and MARSHALL, JJ., joined. DOUGLAS, BRENNAN, and BLACKMUN, JJ., filed dissenting opinions. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70–34

Sierra Club, Petitioner,
v.
Rogers C. B. Morton, Individually, and as Secretary of the Interior of the United States, et al.

On Writ of Certiorari to the United States Court of Appeals to the Ninth Circuit.

[April 19, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

I

The Mineral King Valley is an area of great natural beauty nestled in the Sierra Nevada Mountains in Tulare County, California, adjacent to Sequoia National Park. It has been part of the Sequoia National Forest since 1926, and is designated as a National Game Refuge by special Act of Congress.[1] Though once the site of extensive mining activity, Mineral King is now used almost exclusively for recreational purposes. Its relative inaccessibility and lack of development have limited the number of visitors each year, and at the same time have preserved the valley's quality as a quasi-wilderness area largely uncluttered by the products of civilization.

The United States Forest Service, which is entrusted with the maintenance and administration of national forests, began in the late 1940's to give consideration to Mineral King as a potential site for recreational de-

[1] Act of July 3, 1926, 44 Stat. 821, 16 U. S. C. § 688.

velopment. Prodded by a rapidly increasing demand for skiing facilities, the Forest Service published a prospectus in 1965, inviting bids from private developers for the construction and operation of a ski resort that would also serve as a summer recreation area. The proposal of Walt Disney Enterprises, Inc., was chosen from those of six bidders, and Disney received a three-year permit to conduct surveys and explorations in the valley in connection with its preparation of a complete master plan for the resort.

The final Disney plan, approved by the Forest Service in January, 1969, outlines a $35 million complex of motels, restaurants, swimming pools, parking lots, and other structures designed to accommodate 14,000 visitors daily. This complex is to be constructed on 80 acres of the valley floor under a 30-year use permit from the Forest Service. Other facilities, including ski lifts, ski trails, a cog-assisted railway, and utility installations, are to be constructed on the mountain slopes and in other parts of the valley under a revocable special use permit. To provide access to the resort, the State of California proposes to construct a highway 20 miles in length. A section of this road would traverse Sequoia National Park, as would a proposed high-voltage power line needed to provide electricity for the resort. Both the highway and the power line require the approval of the Department of the Interior, which is entrusted with the preservation and maintenance of the national parks.

Representatives of the Sierra Club, who favor maintaining Mineral King largely in its present state, followed the progress of recreational planning for the valley with close attention and increasing dismay. They unsuccessfully sought a public hearing on the proposed development in 1965, and in subsequent correspondence with officials of the Forest Service and the Department

of the Interior, they expressed the Club's objections to Disney's plan as a whole and to particular features included in it. In June of 1969 the Club filed the present suit in the United States District Court for the Northern District of California, seeking a declaratory judgment that various aspects of the proposed development contravene federal laws and regulations governing the preservation of national parks, forests, and game refuges,[2] and also seeking preliminary and permanent injunctions restraining the federal officials involved from granting their approval or issuing permits in connection with the Mineral King project. The petitioner Sierra Club sued as a membership corporation with "a special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country," and invoked the judicial review provisions of the Administrative Procedure Act, 5 U. S. C. § 701 *et seq.*

After two days of hearings, the District Court granted the requested preliminary injunction. It rejected the respondents' challenge to the Sierra Club's standing to sue, and determined that the hearing had raised questions "concerning possible excess of statutory authority,

[2] As analyzed by the District Court, the complaint alleged violations of law falling into four categories. First, it claimed that the special use permit for construction of the resort exceeded the maximum acreage limitation placed upon such permits by 16 U. S. C. § 497, and that issuance of a "revocable" use permit was beyond the authority of the Forest Service. Second, it challenged the proposed permit for the highway through Sequoia National Park on the grounds that the highway would not serve any of the purposes of the park in alleged violation of 16 U. S. C. § 1, and that it would destroy timber and other natural resources protected by 16 U. S. C. §§ 41 and 43. Third, it claimed that the Forest Service and the Department of the Interior had violated their own regulations by failing to hold adequate public hearings on the proposed project. Finally, the complaint asserted that 16 U. S. C. § 45 (c) requires specific congressional authorization of a permit for construction of a power transmission line within the limits of a national park.

sufficiently substantial and serious to justify a preliminary injunction . . . ." The respondents appealed, and the Court of Appeals for the Ninth Circuit reversed. 433 F. 2d 24. With respect to the petitioner's standing, the court noted that there was "no allegation in the complaint that members of the Sierra Club would be affected by the actions of [the respondents] other than the fact that the actions are personally displeasing or distasteful to them," *id.*, at 33, and concluded:

> "We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority." *Id.*, at 30.

Alternatively, the Court of Appeals held that the Sierra Club had not made an adequate showing of irreparable injury and likelihood of success on the merits to justify issuance of a preliminary injunction. The court thus vacated the injunction. The Sierra Club filed a petition for a writ of certiorari which we granted, 401 U. S. 907, to review the questions of federal law presented.

II

The first question presented is whether the Sierra Club has alleged facts that entitle it to obtain judicial review of the challenged action. Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the out-

come of the controversy," *Baker* v. *Carr,* 369 U. S. 186, 204, as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast* v. *Cohen,* 392 U. S. 83, 101. Where, however, Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.[3]

The Sierra Club relies upon § 10 of the Administrative Procedure Act (APA), 80 Stat. 392, 5 U. S. C. § 702, which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Early decisions under this statute interpreted the language as adopting the various formulations of "legal

[3] Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, *Muskrat* v. *United States,* 219 U. S. 346, or to entertain "friendly" suits, *United States* v. *Johnson,* 319 U. S. 302, or to resolve "political questions," *Luther* v. *Borden,* 7 How. 1, because suits of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, the question whether the litigant is a "proper party to request an adjudication of a particular issue," *Flast* v. *Cohen,* 392 U. S. 83, 100, is one within the power of Congress to determine. Cf. *FCC* v. *Sanders Bros. Radio Station,* 309 U. S. 470, 477; *Flast* v. *Cohen,* 392 U. S. 83, 120 (Harlan, J., dissenting); *Associated Industries* v. *Ickes,* 134 F. 2d 694, 704. See generally Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L. J. 816, 837 ff. (1969); Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U. Pa. L. Rev. 1033 (1968).

interest" and "legal wrong" then prevailing as constitutional requirements of standing.[4] But, in *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U. S. 150, and *Barlow* v. *Collins*, 397 U. S. 157, decided the same day, we held more broadly that persons had standing to obtain judicial review of federal agency action under § 10 of the APA where they had alleged that the challenged action had caused them "injury in fact," and where the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated.[5]

In *Data Processing*, the injury claimed by the petitioners consisted of harm to their competitive position in the computer servicing market through a ruling by the Comptroller of the Currency that national banks might perform data processing services for their customers. In *Barlow*, the petitioners were tenant farmers who claimed that certain regulations of the Secretary of Agriculture adversely affected their economic position *vis-à-vis* their landlords. These palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory provision for judicial review.[6] Thus, neither *Data Processing* nor *Barlow* addressed itself to the question, which has arisen with increasing frequency in federal courts

[4] See, *e. g.*, *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 932; *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F. 2d 912, 914; *Duba* v. *Schuetzle*, 303 F. 2d 570, 574. The theory of a "legal interest" is expressed in its extreme form in *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479–481. See also *Tennessee Electric Power Co.* v. *TVA*, 306 U. S. 118, 137–139.

[5] In deciding this case we do not reach any questions concerning the meaning of the "zone of interests" test or its possible application to the facts here presented.

[6] See, *e. g.*, *Hardin* v. *Kentucky Utilities Co.*, 390 U. S. 1, 7; *Chicago* v. *Atchison, T. & S. F. R. Co.*, 357 U. S. 77, 83; *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 477.

in recent years, as to what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared.[7] That question is presented in this case.

III

The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development "would destroy or otherwise affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations." We do not question that this type of harm may amount to an "injury in fact" sufficient to lay the basis for standing under § 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the "injury in fact" test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.

The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia

[7] No question of standing was raised in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402. The complaint in that case alleged that the organizational plaintiff represented members who were "residents of Memphis, Tennessee who use Overton Park as a park land and recreation area and who have been active since 1964 in efforts to preserve and protect Overton Park as a park land and recreation area."

National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort. The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.[8]

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[8] The only reference in the pleadings to the Sierra Club's interest in the dispute is contained in paragraph 3 of the complaint, which reads in its entirety as follows:

"Plaintiff Sierra Club is a non-profit corporation organized and operating under the laws of the State of California, with its principal place of business in San Francisco, California since 1892. Membership of the Club is approximately 78,000 nationally, with approximately 27,000 members residing in the San Francisco Bay area. For many years the Sierra Club by its activities and conduct has exhibited a special interest in the conservation and sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similarly interested. One of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants as hereinafter more fully appears."

In an *amici curiae* brief filed in this Court by the Wilderness Society and others, it is asserted that the Sierra Club has conducted regular camping trips into the Mineral King area, and that various members of the Club have used and continue to use the area for recreational purposes. These allegations were not contained in the pleadings, nor were they brought to the attention of the Court of Appeals. Moreover, the Sierra Club in its reply brief specifically declines to rely on its individualized interest, as a basis for standing. See n. 15, *infra*. Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal Rules of Civil Procedure.

The Club apparently regarded any allegations of individualized injury as superfluous, on the theory that this was a "public" action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a "representative of the public."[9] This theory reflects a misunderstanding of our cases involving so-called "public actions" in the area of administrative law.

The origin of the theory advanced by the Sierra Club may be traced to a dictum in *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4, in which the licensee of a radio station in Cincinnati, Ohio, sought a stay of an order of the FCC allowing another radio station in a nearby city to change its frequency and increase its range. In discussing its power to grant a stay, the Court noted that "these private litigants have standing only as representatives of the public interest." *Id.*, at 14. But that observation did not describe the basis upon which the appellant was allowed to obtain judicial review as a "person aggrieved" within the meaning of the statute involved in that case,[10] since Scripps-Howard was clearly "aggrieved" by reason of the economic injury that it would suffer as a result of the

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[9] This approach to the question of standing was adopted by the Court of Appeals for the Second Circuit in *Citizens Committee for the Hudson Valley* v. *Volpe*, 425 F. 2d 97, 105:

"We hold, therefore, that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest."

[10] The statute involved was § 402 (b) (2) of the Communications Act of 1934, 48 Stat. 1064, 1093.

Commission's action.[11] The Court's statement was rather directed to the theory upon which Congress had authorized judicial review of the Commission's actions. That theory had been described earlier in *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 477, as follows:

> "Congress had some purpose in enacting § 402 (b)(2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal."

Taken together, *Sanders* and *Scripps-Howard* thus established a dual proposition: the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.[12] It was in the latter sense that the "standing" of the appellant in *Scripps-Howard* existed only as a "representative of the public interest." It is in a similar sense that we have used the phrase "private attorney general" to describe the function performed by persons upon whom Congress has conferred the right to seek judicial re-

[11] This much is clear from the *Scripps-Howard* Court's citation of *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, in which the basis for standing was the competitive injury that the appellee would have suffered by the licensing of another radio station in its listening area.

[12] The distinction between standing to initiate a review proceeding, and standing to assert the rights of the public or of third persons once the proceeding is properly initiated, is discussed in 3 Davis, Administrative Law Treatise, §§ 22.05–22.07 (1958).

view of agency action. See *Data Processing, supra,* at 154.

The trend of cases arising under the APA and other statutes authorizing judicial review of federal agency action has been towards recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and towards discarding the notion that an injury that is widely shared is *ipso facto* not an injury sufficient to provide the basis for judicial review.[13] We noted this development with approval in *Data Processing, supra,* at 154, in saying that the interest alleged to have been injured "may reflect 'aesthetic, conservational, and recreational' as well as economic values." But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must have himself suffered an injury.

Some courts have indicated a willingness to take this latter step by conferring standing upon organizations that have demonstrated "an organizational interest in the problem" of environmental or consumer protection. *Environmental Defense Fund, Inc.* v. *Hardin,* 428

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[13] See, *e. g., Environmental Defense Fund, Inc.* v. *Hardin,* 428 F. 2d 1093, 1097 (interest in health affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); *Office of Communication of the United Church of Christ* v. *FCC,* 359 F. 2d 994, 1005 (interest of television viewers in the programming of a local station licensed by the FCC); *Scenic Hudson Preservation Conf.* v. *FPC,* 354 F. 2d 608, 615–616 (interests in aesthetics, recreation, and orderly community planning affected by FPC licensing of a hydroelectric project); *Reade* v. *Ewing,* 205 F. 2d 630, 631–632 (interest of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration); *Crowther* v. *Seaborg,* 312 F. Supp. 1205, 1212 (interest in health and safety of persons residing near the site of a proposed atomic blast).

F. 2d 1093, 1097.[14] It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. See, *e. g., NAACP* v. *Button,* 371 U. S. 415, 428. But a mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. The Sierra Club is a large and long-established organization, with an historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.

The requirement that a party seeking review must allege facts showing that he is himself adversely af-

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[14] See *Citizens Committee for the Hudson Valley* v. *Volpe,* n. 8, *supra; Environmental Defense Fund, Inc.* v. *Corps of Engineers,* 325 F. Supp. 728, 734–736; *Izaac Walton League* v. *St. Clair,* 313 F. Supp. 1312, 1317. See also *Scenic Hudson Preservation Conf.* v. *FPC, supra,* at 616:

"In order to ensure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under § 313 (b) [of the Federal Power Act]."

In most, if not all of these cases, at least one party to the proceeding did assert an individualized injury either to himself or, in the case of an organization, to its members.

fected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process.[15] It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.[16] The principle that the Sierra Club would have us establish in this case would do just that.

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[15] In its reply brief, after noting the fact that it might have chosen to assert individualized injury to itself or to its members as a basis for standing, the Sierra Club states:

"The Government seeks to create a 'heads I win, tails you lose' situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to a competing public interest. Counsel have shaped their case to avoid this trap."

The short answer to this contention is that the "trap" does not exist. The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief. See n. 12 and accompanying text, *supra*.

[16] Every schoolboy may be familiar with de Tocqueville's famous observation, written in the 1830's, that "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question." 1 Democracy in America 280 (Alfred A. Knopf, 1945). Less familiar, however, is de Tocqueville's further observation that judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury.

"It will be seen, also, that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton

As we conclude that the Court of Appeals was correct in its holding that the Sierra Club lacked standing to maintain this action, we do not reach any other questions presented in the petition, and we intimate no view on the merits of the complaint. The judgment is

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

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assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis for a prosecution." *Id.*, at 102.

SUPREME COURT OF THE UNITED STATES

No. 70–34

Sierra Club, Petitioner,
v.
Rogers C. B. Morton, Individually, and as Secretary of the Interior of the United States, et al.

On Writ of Certiorari to the United States Court of Appeals to the Ninth Circuit.

[April 19, 1972]

MR. JUSTICE DOUGLAS, dissenting.

I share the views of my Brother BLACKMUN and would reverse the judgment below.

The critical question of "standing" [1] would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be dispoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, Should Trees Have Standing? Toward Legal Rights for Natural Objects, 45 S. Cal. L. Rev. 450 (1972). This suit would therefore be more properly labeled as *Mineral King* v. *Morton*.

Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for

[1] See generally *Data Processing Service* v. *Camp*, 397 U. S. 150 (1970); *Barlow* v. *Collins*, 397 U. S. 159 (1970); *Flast* v. *Cohen*, 392 U. S. 83 (1968). See also MR. JUSTICE BRENNAN's concurring opinion in *Barlow* v. *Collins*, *supra*, at 167. The issue of statutory standing aside, no doubt exists that "injury in fact" to "aesthetic" and "conservational" interests is here sufficiently threatened to satisfy the case or controversy clause. *Data Processing Service* v. *Camp*, *supra*, at 154.

maritime purposes.[2] The corporation sole—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases.[3] The ordinary corporation is a "person" for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.[4]

So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees,

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[2] *In rem* actions brought to adjudicate libellants' interests in vessels are well known in admiralty. Gilmore & Black, The Law of Admiralty 31 (1957). But admiralty also permits a salvage action to be brought in the name of the rescuing vessel. *The Comanche*, 75 U. S. (8 Wall.) 449, 476 (1869). And, in collision litigation, the first-libelled ship may counterclaim in its own name. *The Gylfe* v. *The Trujillo*, 209 F. 2d 386 (CA2 1954). Our case law has personified vessels:

"A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron. . . . In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed. . . . She acquires a personality of her own." *Tucker* v. *Alexandroff*, 183 U. S. 424, 438

[3] At common law, an office holder, such as a priest or the King, and his successors constituted a corporation sole, a legal entity distinct from the personality which managed it. Rights and duties were deemed to adhere to this device rather than to the office holder in order to provide continuity after the latter retired. The notion is occasionally revived by American courts. *E. g.*, *Reid* v. *Barry*, 93 Fla. 849, 112 So. 846 (1927), discussed in Note, 12 Minn. L. Rev. 295 (1928), and in Note, 26 Mich. L. Rev. 545 (1928); see generally 1 Fletcher Cyclopedia Corporation, §§ 50–53; P. Potter, Law of Corporation 27 (1881).

[4] Early jurists considered the conventional corporation to be a highly artificial entity. Lord Coke opined that a corporation's creation "rests only in intendment and consideration of the law." The Case of Suttons Hospital, 77 Eng. Rep. 937, 973 (K. B. 1613). Mr. Chief Justice Marshall added that the device is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Trustees of Dartmouth College* v. *Woodward*, 17 U. S. (4 Wheat.) 518, 636 (1819). Today suits in the names of corporations are taken for granted.

swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.

I do not know Mineral King. I have never seen it nor travelled it, though I have seen articles describing its proposed "development" [5] notably Hano, *Protectionists* v. *Recreationists*—the Battle of Mineral King,

[5] Although in the past Mineral King Valley has annually supplied about 70,000 visitor-days of simpler and more rustic forms of recreation—hiking, camping and skiing (without lifts)—the Forest Service in 1949 and again in 1965 invited developers to submit proposals to "improve" the Valley for resort use. Walt Disney Productions won the competition and transformed the Service's idea into a mammoth project 10 times its originally proposed dimensions. For example, while the Forest Service prospectus called for an investment of at least $3 million and a sleeping capacity of at least 100, Disney will spend $35.3 million and will bed down 3300 persons by 1978. Disney also plans a nine-level parking structure with two supplemental lots for automobiles, 10 restaurants and 20 ski lifts. The Service's annual license revenue is hitched to Disney's profits. Under Disneys' projections, the Valley will be forced to accommodate a tourist population twice as dense as that in Yosemite Valley on a busy day. And, although Disney has bought up much of the private land near the project, another commercial firm plans to transform an adjoining 160-acre parcel into a "piggyback" resort complex, further adding to the volume of human activity the Valley must endure. See generally; Note, Mineral King Valley: Who Shall Watch the Watchman?, 25 Rutgers L. Rev. 103, 107 (1970); Thar's Gold in Those Hills, 206 The Nation 260 (1968). For a general critique of mass recreation enclaves in national forests see Christian Science Monitor,

N. Y. Times Mag., Aug. 17, 1969; and Browning, Mickey Mouse in the Mountains, Harper's, March 1972, p. 65. The Sierra Club in its complaint alleges that "One of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains." The District Court held that this uncontested allegation made the Sierra Club "sufficiently aggrieved" to have "standing" to sue on behalf of Mineral King.

Mineral King is doubtless like other wonders of the Sierra Nevada such as Tuolumne Meadows and the John Muir Trail. Those who hike it, fish it, hunt it, camp in it, or frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be a few or many. Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.

The Solicitor General, whose views on this subject are in the Appendix to this opinion, takes a wholly different approach. He considers the problem in terms of "government by the Judiciary." With all respect, the problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed. It is, of course, true that most of them are under the control of a federal or state agency. The standards given those agencies are usually expressed in terms of the "public interest." Yet "public interest" has so many differing shades of meaning as to be quite

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Nov. 22, 1965, at 5, col. 1. Michael Frome cautions that the national forests are "fragile" and "deteriorate rapidly with excessive recreation use" because "(t)he trampling effect alone eliminates vegatative growth, creating erosion and water runoff problems. The concentration of people, particularly in horse parties, on excessively steep slopes that follow old Indian or cattle routes, has torn up the landscape of the High Sierras in California and sent tons of wilderness soil washing downstream each year." M. Frome, The Forest Service 69 (1971).

meaningless on the environmental front. Congress accordingly has adopted ecological standards in the National Environmental Policy Act of 1969, Pub. L. 91–90, 83 Stat. 852, 42 U. S. C. § 4321, *et seq.*, and guidelines for agency action have been provided by the Council on Environmental Quality of which Russell E. Train is Chairman. See 36 Fed. Reg. 7724.

Yet the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency which in time develops between the regulator and the regulated.[6] As early as 1894, Attorney General Olney

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[6] The federal budget annually includes about $75 million for underwriting about 1,500 advisory committees attached to various regulatory agencies. These groups are almost exclusively composed of industry representatives appointed by the President or by Cabinet members. Although public members may be on these committees, they are rarely asked to serve. Senator Lee Metcalf warns: "Industry advisory committees exist inside most important federal agencies, and even have offices in some. Legally, their function is purely as kibitzer, but in practice many have become internal lobbies—printing industry handouts in the Government Printing Office with taxpayers' money, and even influencing policies. Industry committees perform the dual function of stopping government from finding out about corporations while at the same time helping corporations get inside information about what government is doing. Sometimes, the same company that sits on an advisory council that obstructs or turns down a government questionnaire is precisely the company which is withholding information the government needs in order to enforce a law." Metcalf, The Vested Oracles: How Industry Regulates Government, 3 The Washington Monthly 45 (1971). For proceedings conducted by Senator Metcalf exposing these relationships,

predicted that regulatory agencies might become "industry-minded," as illustrated by his forecast concerning the Interstate Commerce Commission:

> "The Commission is or can be made of great use to the railroads. It satisfies the public clamor for supervision of the railroads, at the same time that supervision is almost entirely nominal. Moreover, the older the Commission gets to be, the more likely it is to take a business and railroad view of things." M. Josephson, The Politicos 526 (1938).

Years later a court of appeals observed, "the recurring question which has plagued public regulation of industry [is] whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is supposed to protect." *Moss* v. *CAB*, 430 F. 2d 891, 893 (CADC 1970). See also *Office of Communication of the United Church of Christ* v. *FCC*, 359 F. 2d 994,

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see Hearings on S. 3067 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 91st Cong., 2d Sess. (1970); Hearings on S. 1737, S. 1964, and S. 2064 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 92d Cong., 1st Sess. (1971).

The web spun about administrative agencies by industry representatives does not depend, of course, solely upon advisory committees for effectiveness. See Elman, Administrative Reform of the Federal Trade Commission, 59 Geo. L. J. 777, 788 (1971); Johnson, A New Fidelity to the Regulatory Ideal, 59 Geo. L. J. 869, 874, 906 (1971); R. Berkman & K. Viscusi, Damming The West, The Ralph Nadar Study Group Report On The Bureau of Reclamation 155 (1971); R. Fellmeth, The Interstate Commerce Omission, Ralph Nader Study Group on the Interstate Commerce Commission and Transportation 15–39 and *passim* (1970); J. Turner, The Chemical Feast, The Ralph Nader Study Group on Food Protection and the Food and Drug Administration *passim* (1970); Massel, The Regulatory Process, 26 Law and Contemporary Problems 181, 189 (1961); J. Landis, Report on Regulatory Agencies to the President-Elect 13, 69 (1960).

1003–1004; *Udall* v. *FPC*, 387 U. S. 428; *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, 449 F. 2d 1109; *Environmental Defense Fund Inc.* v. *Ruckelshaus*, 439 F. 2d 584; *Environmental Defense Fund, Inc.* v. *HEW*, 428 F. 2d 1083; *Scenic Hudson Preservation Conf.* v. *FPC*, 354 F. 2d 608, 620. But see Jaffe, The Federal Regulatory Agencies In a Perspective: Administrative Limitation In A Political Setting, 11 Bos. C. I. & C. Rev. 565 (1970) (labels "industry-mindedness" as "devil" theory).

The Forest Service—one of the federal agencies behind the scheme to despoil Mineral King—has been notorious for its alignment with lumber companies, although its mandate from Congress directs it to consider the various aspects of multiple use in its supervision of the national forests.[7]

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[7] The Forest Reserve Act of 1897, 30 Stat. 34, 16 U. S. C. § 551, imposed upon the Secretary of the Interior the duty to "preserve the [national] forests . . . from destruction" by regulating their "occupancy and use." In 1905 these duties and powers were transferred to the Forest Service created within the Department of Agriculture by the Act of Feb. 1, 1905, 33 Stat. 628, 16 U. S. C. § 472. The phrase "occupancy and use" has been the cornerstone for the concept of "multiple use" of national forests, that is, the policy that uses other than logging were also to be taken into consideration in managing our 154 national forests. This policy was made more explicit by the 1960 Multiple Use and Sustained Yield Act, 74 Stat. 215, 43 U. S. C. § 315, which provides that competing considerations should include outdoor recreation, range, timber, watershed, wildlife and fish purposes. The Forest Service, influenced by powerful logging interests, has, however, paid only lip service to its multiple use mandate and has auctioned away millions of timberland acres without considering environmental or conservational interests. The importance of national forests to the construction and logging industries results from the type of lumber grown therein which is well suited to builders' needs. For example, Western acreage produces douglas fir (structural support) and ponderosa pine (plywood lamination). In order to preserve the total acreage and so-called "maturity" of timber, the annual size of a Forest Service harvest is supposedly equated with expected yearly reforestation. Nonethe-

The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal

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less, yearly cuts have increased from 5.6 billion board feet in 1950 to 13.74 billion in 1971. Forestry professionals challenge the Service's explanation that this 240% harvest increas is not really overcutting but instead has resulted from its improved management of timberlands. "Improved management" answer the critics is only a euphemism for exaggerated regrowth forecasts by the Service. N. Y. Times, Nov. 15, 1971, at 48, col. 1. Recent rises in lumber prices have caused a new round of industry pressure to auction more federally owned timber. See Wagner, Resources Report/Lumbermen, conservationists head for new battle over government timber, 3 Nat. J. 657 (1971).

Aside from the issue of how much timber should be cut annually, another crucial question is *how* lumber should be harvested. Despite much criticism the Forest Service had adhered to a policy of permitting logging companies to "clearcut" tracts of auctioned acreage. "Clearcutting," somewhat analogous to strip mining, is the indiscriminate and complete shaving from the earth of all trees—regardless of size or age—often across hundreds of contiguous acres.

Of clearcutting Senator Gale McGee, a leading antagonist of Forest Service policy, complains: "The Forest Service's management policies are wreaking havoc with the environment. Soil is eroding, reforestation is neglected, if not ignored, streams are silting, and clearcutting remains a basic practice." N. Y. Times, Nov. 14, 1971, at 60, col. 2. He adds "In Wyoming . . . the Forest Service is very much nursemaid . . . to the lumber industry . . . ." Hearings on Management Practice on the Public Lands before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, pt. 1, at 7 (1971).

Senator Jennings Randolph offers a similar criticism of the leveling by lumber companies of large portions of the Monongahela National Forest in West Virginia. *Id.*, 9. See also 116 Cong. Rec. 36971 (1970) (reprinted speech of Sen. Jennings Randolph concerning Forest Service policy in Monongahela National Forest). To investigate similar controversy surrounding the Service's management of the Bitterroot National Forest in Montana, Senator Lee Metcalf recently asked forestry professionals at the University of Montana to study local harvesting practices. The faculty group concluded that public dissatisfaction had arisen from the Forest Service's "over-

agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.[8]

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riding concern for sawtimber production" and its "insensitivity to the related forest uses . . . and the public interest in environmental values." S. Doc. 91–115, 91st Cong., 2d Sess., 14 (1970). See also Behan, Timber Mining: Accusation or Prospect? 77 American Forests 4 (1971) (additional comments of faculty participant); Reich, The Public and the Nation's Forests, 50 Cal. L. Rev. 381–400 (1962).

Former Secretary of the Interior Walter Hickel similarly faulted clearcutting as excusable only as a money-saving harvesting practice for large lumber corporations. W. Hickel, Who Owns America? 130 (1971). See also Risser, the U. S. Forest Service; Smokey's Strip Miners, 3 The Washington Monthly 16 (1971). And at least one Forest Service study team shared some of these criticisms of clearcutting. U. S. Dept. of Agriculture, Forest Management in Wyoming 12 (1971). See also Public Land Law Review Comm'n, Report to the President and to the Congress 44 (1970); Chapman, Effects of Logging upon Fish Resources of the West Coast, 60 J. of For 533 (1962).

A third category of criticism results from the Service's huge backlog of delayed reforestation projects. It is true that Congress has underfunded replanting programs of the Service but it is also true that the Service and lumber companies have regularly ensured that Congress fully fund budgets requested for the Forest Service's "timber sales and management." Frome, The Environment and Timber Resources, What's Ahead for Our Public Lands? 24 (A. Pyles ed. 1970).

[8] Permitting a court to appoint a representative of an inanimate object would not be significantly different from customary judicial appointments of guardians *ad litem,* executors, conservators, receivers, or counsel for indigents.

The values that ride on decisions such as the present one are often not appreciated even by the so-called experts.

"A teaspoon of living earth contains 5 million bacteria, 20 million fungi, one million protozoa, and 200,000 algae. No living human

Perhaps they will not win. Perhaps the bulldozers of "progress" will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard?

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can predict what vital miracles may be locked in this dab of life, this stupendous reservoir of genetic materials that have evolved continuously since the dawn of the earth. For example, molds have existed on earth for about 2 billion years. But only in this century did we unlock the secret of the penicillins, tetracyclines, and other antibiotics from the lowly molds, and thus fashion the most powerful and effective medicines ever discovered by man. Medical scientists still wince at the thought that we might have inadvertently wiped out the rhesus monkey, medically, the most important research animal on earth. And who knows what revelations might lie in the cells of the blackback gorilla nesting in his eyrie this moment in the Virunga Mountains of Rwanda? And what might we have learned from the European lion, the first species formally noted (in 80 A. D.) as extinct by the Romans?

"When a species is gone, it is gone forever. Nature's genetic chain, billions of years in the making, is broken for all time." 13 Conserv. 4 (Nov. 1971).

Aldo Leopold wrote in Round River (1953) p. 147:

"In Germany there is a mountain called the Spessart. Its south slope bears the most magnificent oaks in the world. American cabinetmakers, when they want the last word in quality, use Spessart oak. The north slope, which should be better, bears an indifferent stand of Scotch pine. Why? Both slopes are part of the same state forest; both have been managed with equally scrupulous care for two centuries. Why the difference?

"Kick up the litter under the oaks and you will see that the leaves rot almost as fast as they fall. Under the pines, though, the needles pile up as a thick duff; decay is much slower. Why? Because in the Middle Ages the south slope was preserved as a deer forest by a hunting bishop; the north slope was pastured, plowed, and cut by settlers, just as we do with our woodlots in Wisconsin and Iowa today. Only after this period of abuse something happened to the microscopic flora and fauna of the soil. The number of species was greatly reduced, *i. e.*, the digestive apparatus of the soil lost some of its parts. Two centuries of conservation have not sufficed to restore

Those who hike the Appalachian Trail into Sunfish Pond, New Jersey, and camp or sleep there, or run the Allagash in Maine, or climb the Guadalupes in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away. Those who merely are caught up in environmental news or propaganda and flock to defend these waters or areas may be treated differently. That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life [9] which it represents will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.

Ecology reflects the land ethic; and Aldo Leopold wrote in A Sand County Almanac 204 (1949), "The

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these losses. It required the modern microscope, and a century of research in soil science, to discover the existence of these 'small cogs and wheels' which determine harmony or disharmony between men and land in the Spessart."

[9] Senator Cranston has introduced a bill to establish a 35,000 acre Pupfish National Monument to honor the pupfish which are one inch long and are useless to man. S. 2141, 92d Cong., 1st Sess. They are too small to eat and unfit for a home aquarium. But as Michael Frome has said:

"Still, I agree with Senator Cranston that saving the pupfish would symbolize our appreciation of diversity in God's tired old biosphere, the qualities which hold it together and the interaction of life forms. When fishermen rise up united to save the pupfish they can save the world as well." Field & Stream, December 1971, p. 74.

land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively, the land."

That, as I see it, is the issue of "standing" in the present case and controversy.

APPENDIX TO OPINION OF DOUGLAS, J.

Statement of the Solicitor-General:

. . . . . .

"As far as I know, no case has yet been decided which holds that a plaintiff which merely asserts that, to quote from the complaint here, its interest would be widely affected, and that 'it would be aggrieved,' by the acts of the defendant, has standing to raise legal questions in court.

"But why not? Do not the courts exist to decide legal questions? And are they not the most impartial and learned agencies we have in our governmental system? Are there not many questions which must be decided by courts? Why should not the courts decide any question which any citizen wants to raise? As the tenor of my argument indicates, this raises, I think, a true question, perhaps a somewhat novel question, in the separation of powers. . . .

"Ours is not a government by the Judiciary. It is a government of three branches, each of which was intended to have broad and effective powers subject to checks and balances. In litigable cases, the courts have great authority. But the Founders also intended that the Congress should have wide powers, and that the executive branch should have wide powers. All these officers have great responsibilities. They are no less sworn than are the members of this Court to uphold the Constitution of the United States.

"This, I submit, is what really lies behind the standing doctrine, embodied in those cryptic words 'case' and 'controversy' in Article III of the Constitution. Analytically, one could have a system of government in which every legal question arising in the course of government would be decided by the courts. It would not be, I submit, a good system. More important, it is not the sys-

tem which was ordained and established in our Constitution, as it has been understood for nearly 200 years.

"Over the past 20 or 25 years there has been a great shift in the decision of legal questions in our governmental operations into the courts. This has been the result of continuous whittling away of the numerous doctrines which have been established over the years, designed to minimize the number of governmental questions which it was the responsibility of the courts to consider.

"I have already mentioned the most ancient of all, case or controversy, which was early relied on to prevent the presentation of feigned issues to the court. But there are many other doctrines, which I cannot go into in detail: reviewability, justiciability, sovereign immunity, mootness in various aspects, statutes of limitations and laches, jursdictional amount, real party in interest and various questions in relation to joinder. Under all of these headings, limitations which previously existed to minimize the number of questions decided in courts have broken down in varying degrees. I might also mention the explosive development of class actions which has thrown more and more issues into the courts. . . .

"If there is standing in this case, I find it very difficult to think of any legal issue arising in government which will not have to await one or more decisions of the court before the administrator sworn to uphold the law, can take any action. I'm not sure that this is good for the government. I'm not sure that it is good for the courts. I do find myself more and more sure that it is not the kind of allocation of governmental power in our tripartite constitutional system that was contemplated by the Founders. . . .

"I do not suggest that administrators can act at their whim and without any check at all. On the contrary, in this area they are subject to continuous check by the Congress. Congress can stop this development any time it wants to."

SUPREME COURT OF THE UNITED STATES

No. 70–34

Sierra Club, Petitioner, *v.* Rogers C. B. Morton, Individually, and as Secretary of the Interior of the United States, et al.	On Writ of Certiorari to the United States Court of Appeals to the Ninth Circuit.

[April 19, 1972]

MR. JUSTICE BRENNAN, dissenting.

I agree that the Sierra Club has standing for the reasons stated by my Brother BLACKMUN in Alternative No. 2 of his dissent. I therefore would reach the merits. Since the Court does not do so, however, I simply note agreement with my Brother BLACKMUN that the merits are substantial.

SUPREME COURT OF THE UNITED STATES

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[April 19, 1972]

MR. JUSTICE BLACKMUN, dissenting.

The Court's opinion is a practical one espousing and adhering to traditional notions of standing as somewhat modernized by *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U. S. 150 (1970); *Barlow* v. *Collins,* 397 U. S. 159 (1970); and *Flast* v. *Cohen,* 392 U. S. 83 (1968). If this were an ordinary case, I would join the opinion and the Court's judgment and be quite content.

But this is not ordinary, run-of-the-mill litigation. The case poses—if only we choose to acknowledge and reach them—significant aspects of a wide, growing and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?

The ultimate result of the Court's decision today, I fear, and sadly so, is that the 35.3-million-dollar complex, over 10 times greater than the Forest Service's suggested minimum, will now hastily proceed to completion; that serious opposition to it will recede in discouragement; and that Mineral King, the "area of great natural beauty

nestled in the Sierra Nevada Mountains," to use the Court's words, will become defaced, at least in part, and, like so many other areas, will cease to be "uncluttered by the products of civilization."

I believe this will come about because: (1) The District Court, although it accepted standing for the Sierra Club and granted preliminary injunctive relief, was reversed by the Court of Appeals, and this Court now upholds that reversal. (2) With the reversal, interim relief by the District Court is now out of the question and a permanent injunction becomes most unlikely. (3) The Sierra Club may not choose to amend its complaint or, if it does desire to do so, may not, at this late date, be granted permission. (4) The ever-present pressure to get the project underway will mount. (5) Once underway, any prospect of bringing it to a halt will grow dim. Reasons, most of them economic, for not stopping the project will have a tendency to multiply. And the irreparable harm will be largely inflicted in the earlier stages of construction and development.

Rather than pursue the course the Court has chosen to take by its affirmance of the judgment of the Court of Appeals, I would adopt one of two alternatives:

1. I would reverse that judgment and, instead, approve the judgment of the District Court which recognized standing in the Sierra Club and granted preliminary relief. I would be willing to do this on condition that the Sierra Club forthwith amend its complaint to meet the specifications the Court prescribes for standing. If Sierra Club fails or refuses to take that step, so be it; the case will then collapse. But if it does amend, the merits will be before the trial court once again. As the Court's footnote 2, *ante*, p. 3, so clearly reveals, the issues on the merits are substantial and deserve resolution. They assay new ground. They are crucial to the future of Mineral King. They raise important ramifications for

the quality of the country's public land management. They pose the propriety of the "dual permit" device as a means of avoiding the 80-acre "recreation and resort" limitation imposed by Congress in 16 U. S. C. § 497, an issue that apparently has never been litigated, and is clearly substantial in light of the congressional expansion of the limitation in 1956 arguably to put teeth into the old, unrealistic five-acre limitation. In fact, they concern the propriety of the 80-acre permit itself and the consistency of the entire, enormous development with the statutory purposes of the Sequoia Game Refuge, of which the Valley is a part. In the context of this particular development, substantial questions are raised about the use of National Park area for Disney purposes for a new high speed road and a 66,000-volt power line to serve the complex. Lack of compliance with existing administrative regulations is also charged. These issues are not shallow or perfunctory.

2. Alternatively, I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide and well-recognized attributes and purposes in the area of environment, to litigate environmental issues. This incursion upon tradition need not be very extensive. Certainly, it should be no cause for alarm. It is no more progressive than was the decision in *Data Processing* itself. It need only recognize the interest of one who has a provable, sincere, dedicated, and established status. We need not fear that Pandora's box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past. Who would have suspected 20 years ago that the concepts of standing enunciated in *Data Processing* and *Barlow* would be the measure for

today? And MR. JUSTICE DOUGLAS, in his eloquent opinion, has imaginatively suggested another means and one, in its own way, with obvious, appropriate and self-imposed limitations as to standing. As I read what he has written, he makes only one addition to the customary criteria (the existence of a genuine dispute; the assurance of adversariness; and a conviction that the party whose standing is challenged will adequately represent the interests he asserts), that is, that the litigant be one who speaks knowingly for the environmental values he asserts.

I make two passing references:

1. The first relates to the Disney figures presented to us. The complex, the Court notes, will accommodate 14,000 visitors *a day* (3,100 overnight; some 800 employees; 10 restaurants; 20 ski lifts). The State of California has proposed to build a new road from Hammond to Mineral King. That road, to the extent of 9.2 miles, is to traverse Sierra National Park. It will have only two lanes, with occasional passing areas, but it will be capable, it is said, of accommodating 700–800 vehicles per hour and a peak of 1,200 per hour. We are told that the State has agreed not to seek any further improvement in road access through the park.

If we assume that the 14,000 daily visitors come by automobile (rather than by helicopter or bus or other known or unknown means) and that each visiting automobile carries four passengers (an assumption, I am sure, that is far too optimistic), those 14,000 visitors will move in 3,500 vehicles. If we confine their movement (as I think we properly may for this mountain area) to 12 hours out of the daily 24, the 3,500 automobiles will pass any given point on the two-lane road at the rate of about 300 per hour. This amounts to five vehicles per minute, or an average of one every 12 seconds. This frequency is further increased to one every six seconds

when the necessary return traffic along that same two-lane road is considered. And this does not include service vehicles and employees' cars. Is this the way we perpetuate the wilderness and its beauty, solitude and quiet?

2. The second relates to the fairly obvious fact that any resident of the Mineral King area—the real "user"—is an unlikely adversary for this Disney-governmental project. He naturally will be inclined to regard the situation as one that should benefit him economically. His fishing or camping or guiding or handyman or general outdoor prowess perhaps will find an early and ready market among the visitors. But that glow of anticipation will be short-lived at best. If he is a true lover of the wilderness—as is likely, or he would not be near Mineral King in the first place—it will not be long before he yearns for the good old days when masses of people—that 14,000 influx per day—and their thus far uncontrollable waste were unknown to Mineral King.

Do we need any further indication and proof that all this means that the area will no longer be one "of great natural beauty" and one "uncluttered by the products of civilization?" Are we to be rendered helpless to consider and evaluate allegations and challenges of this kind because of procedural limitations rooted in traditional concepts of standing? I suspect that this may be the result of today's holding. As the Court points out, *ante*, pp. 11–12, other federal tribunals have not felt themselves so confined.[1] I would join those progressive holdings.

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[1] *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F. 1093, 1096–1097 (CADC 1970); *Citizens for the Hudson Valley* v. *Volpe*, 425 F. 2d 97, 101–105 (CA2 1970), cert. denied, 400 U. S. 949; *Scenic Hudson Preservation Conference* v. *FPC*, 354 F. 2d 608, 615–617 (CA2 1965); *Izaak Walton League* v. *St. Clair*, 313 F. Supp. 1312, 1316–1317 (Minn. 1970); *Environmenal Defense Fund, Inc.* v. *Corps*

The Court chooses to conclude its opinion with a footnote reference to De Tocqueville. In this environmental context I personally prefer the older and particularly pertinent observation and warning of John Donne.[2]

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of Engineers, 324 F. Supp. 878, 879–880 (DC 1971); *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 325 F. Supp. 728, 734–736 (ED Ark. 1971); *Sierra Club* v. *Hardin*, 325 F. Supp. 99, 107–112 (Alas. 1971); *Upper Pecos Association* v. *Stans*, 328 F. Supp. 332, 333–334 (N. Mex. 1971); *Cape May County Chapter, Inc., Izaak Walton League* v. *Macchia*, 329 F. Supp. 504, 510–514 (N. J. 1971).

See *National Automatic Laundry & Cleaning Council* v. *Schultz*, 443 F. 2d 689, 693–694 (CADC 1971); *West Virginia Highlands Conservancy* v. *Island Creek Coal Co.*, 441 F. 2d 232, 234–235 (CA4 1971); *Environmental Defense Fund, Inc.* v. *HEW*, 428 F. 2d 1083, 1085 n. 2 (CADC 1970); *Honchok* v. *Hardin*, 326 F. Supp. 988, 991 (Md. 1971).

[2] "No man is an Iland, intire of itselfe; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any man's death diminishes me, because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; it tolls for thee." Devotions XVII.